MEETING THE REQUIREMENTS OF SUBSTANTIVE AND PROCEDURAL CRITERIA IN DISCHARGE CASES

Dissertation

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By

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Legislation, arbitral and judicial decisions, and public opinion provide evidence of increasing concern for protecting employees from unfair dismissal in both union and nonunion firms. Management's right to discharge is being questioned today more than at any other time in the history of labor-management relations. Thus, organizations must stay abreast of the developments that affect their right to discharge employees.

This study investigates arbitration awards and judicial decisions in discharge cases to provide answers to these questions. Are companies aware of the types of misconduct for which discharge is considered appropriate? Are companies aware of what constitutes the burden of proof requirements in discharge cases? Does management know and follow the proper procedures in handling discharge cases?

The purposes of the study are

1. To determine the extent to which discharges were overturned or modified because the company did not meet the burden of proving a reasonable cause for discharge;
2. To determine the extent to which discharges were overturned or modified because the company did not follow proper dismissal procedures;

3. To develop a model set of guidelines to assist companies in the proper handling of discharge cases. These guidelines present criteria for meeting the just cause and procedural requirements in discharge cases.

This study concludes that no discharges were upheld based only upon procedural factors since a discharge action must first meet the just cause requirements. A case may meet the just cause requirements, yet the decision will be modified or overturned because the company failed to follow the proper discharge procedures. Although the primary issue in each case was to determine whether there was just cause for discharge, the rationale of the arbitrators and judges suggests widespread concern for fulfilling the procedural requirements for discharge. The number of awards in which procedure was cited as a major consideration in deciding whether to uphold, modify, or overturn the discharge supports this conclusion.
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CHAPTER I

INTRODUCTION

Dismissal, the most drastic administrative action that can be taken, was once a popular type of disciplinary action. In recent years, however, the trend has been for companies to resort to discharge action less frequently because of restrictions imposed upon them by the unions and by law (4, p. 417).

Most 19th century United States employers would have been astonished at the suggestion that a decision to dismiss a worker should be reviewed for fairness. They believed the employer-employee relationship conveyed upon them unrestricted dismissal power. Today, however, attempts are being made in the United States to prune arbitrary dismissals from justified dismissals. Government, labor, and business are groping for a fair formula for dismissal as they seek answers to such questions as the following. Under what conditions is dismissal justified? How much dismissal power should an employer have? How much protection from dismissal do employees need? What are the proper procedures for handling dismissals? What is society's role in resolving conflicts between employers and employees (5, pp. 4-5)?
More than three-fourths of the American workers are "at will" employees. This means either the employer or employee may terminate the employment relationship at any time without notice. In the absence of union support via a collective bargaining agreement, the protection of "at will" employees lies with legislators and jurists. Decisions in recent court cases suggest that jurists are cautiously building a list of conditions under which employees may not be discharged lawfully. Executives and managers are having to come to grips with the emerging "due process" rights of all employees. It appears that employees will be provided new protection against abusive discharge either through legislation or further judicial pronouncement (9, p. 67).

Discharged union members generally look to the grievance procedure for help. A typical contract clause that enables union members to have discharges reviewed reads: "Grievances growing out of discharge, layoff, promotion, demotion, hiring, rehiring, and transfer, shall be subject to the grievance procedure. . ." (2, p. 20).

Most contracts provide that workers may be discharged only "for just cause" or "for cause." Just cause means that the employer has a good reason for firing an employee and that the cause has been adequately established by the evidence. Thus, just cause disclaims the common law view that an employer should be free to fire workers without cause. The grievance procedure is the means by which a
discharge is measured against just cause. In the first part of the procedure, management and labor try to resolve their differences over the dismissal. In the second, which becomes operative only when the parties fail to agree, an arbitrator or arbitration panel is given authority to make binding disposition of the dismissal case. The typical grievance moves through three, four, or more steps. In dismissals, however, the first part of the grievance procedure may be shortened with the case going directly to arbitration.

In the Labor Management Relations Act of 1947, Congress expressed preference for private rather than public settlement of disputes when it singled out arbitration, mediation, and conciliation as the means to settle disputes and established the Federal Mediation and Conciliation Service (FMCS) as an independent agency. The use of a knowledgeable, professional, and impartial third party to render decisions is a relatively quick, efficient, and fair way to bring binding decisions to disagreements that elude resolution through the grievance procedure (5, pp. 6-7).

The success of the process is reflected in the steady and rapid growth in the arbitration services rendered by the FMCS. Part of the growth can be attributed to the enactment of new laws that have expanded the authority of the agency. Another contributing factor is the increasing use of the process among federal, state, and local agencies and unions representing their employees. But the primary growth factor
is the acceptability of this resolution mechanism by private industry (6, p. 40).

Private arbitration under union contracts has been given firm and legal support by the courts also. The Supreme Court in effect approved of arbitration in several key cases (5, p. 6).

Statement of the Problem

The judiciary appears to be constructing new avenues to alleviate a perceived imbalance in employer-employee rights as the employer's right to discharge is being restricted. An expansion of those conditions that constitute wrongful discharge is at issue for employees under contract. The issue for "at will" employees is whether the courts will break with precedent and adopt the view that employees not under contract may under some circumstances be wrongfully discharged. Recent judicial decisions addressing these issues signal broadened protection for both groups of employees (9, p. 68).

Discharge and disciplinary issues continue to represent the largest single category of grievance arbitration, accounting for 39 percent of all reported issues to the FMCS in 1978 and 40.2 percent in 1979. In fact, the number of discharge and disciplinary issues increases year after year. The 1978 figure of 3,181 submissions is a 26.2 percent increase over 1977. The number of discharge and disciplinary issues going to arbitration has increased significantly since
1970 when 921 submissions, or 28.7 percent, of the 3,210 submissions were in this category. Thus, the 1978 figure is a 245 percent increase over 1970; the 1979 figure, a 260 percent increase (7, pp. 28-39).

This study analyzes arbitration awards and recent judicial decisions in discharge cases to provide answers to these basic questions: Are companies aware of the types of misconduct for which discharge is considered appropriate? Are companies aware of what constitutes the burden of proof requirements in discharge cases? Does management know and follow the proper procedures in handling discharge cases?

Purposes

The purposes of this study are

1. To determine the extent to which discharges were overturned or modified because the company did not meet the burden of proving a reasonable cause for discharge;

2. To determine the extent to which discharges were overturned or modified because the company did not follow proper dismissal procedures;

3. To develop a model set of guidelines to assist companies in the proper handling of discharge cases. These guidelines will present criteria for meeting the just cause and procedural requirements in discharge cases.
Research Methodology

This research study is based on literature, reported discharge cases that have gone to arbitration, and recent court cases in which employees have challenged the dismissal action of their employers. An extensive search of the literature was made to determine what had been accomplished by others. An examination of dissertations, research studies, periodicals, indexes, books, and other secondary sources provided background material and an understanding of the past and recent developments pertaining to employee dismissals.

Data Base

The data for this study were obtained primarily from discharge cases reported in Labor Arbitration Reports from March 1, 1978, to March 1, 1980. This time frame was chosen because the changing managerial values and humanistic attitudes toward workers; the expanding legal and contractual requirements; and the increasing awareness of acceptable practices by workers, employers, and society as a whole are reflected in the most recent arbitral awards.

Additional information was gathered from court cases dating from February 20, 1970, to April 7, 1980. The limited availability of court cases relating to employee dismissal necessitates a longer time period for court cases than for arbitration cases. Only recently has it become rather common for nonunion employees to look to legislators and jurists for protection from unjust dismissal.
Analysis of Data

For purposes of this study, 332 arbitration cases, which resulted in 351 arbitral awards because of multiple decisions in some cases, and 29 court cases were examined. The awards were analyzed according to the various types of misconduct and classified into five major groups: (1) violation of company rules, (2) incompetence and negligence, (3) insubordination, (4) union activities, and (5) other offenses. The decision in each case and the reasons for upholding, overturning, or modifying the company's action were recorded.

The arbitrator's final decision contains a determination of whether the employee is deserving of discharge, a lesser form of discipline, or no discipline at all. A company's action is overturned or modified because of defects that are substantive (company fails to prove just cause for discharge) and/or procedural (company fails to follow proper procedures in discharging employees). For example, an arbitrator modified the discharge penalty because the company failed to prove that the discharged employees were smoking in an unauthorized area (3). In another situation an employee was reinstated because the employer did not comply with the contract provision requiring progressive disciplinary procedures in dealing with habitual tardiness and absenteeism (8).

Similarly, judicial awards are based upon both substantive and procedural requirements. The reasoning of the court to either uphold or overturn the company's decision to
dismiss an employee is given. Although the opinions in these cases do not reflect the weight of the law throughout the United States, they do provide evidence that management's right to discharge is being examined much more carefully and critically than in the past.

The case analyses will serve as the basis for developing a model set of guidelines to assist in the proper handling of discharge cases in both union and nonunion companies. For a substantive or procedural criterion to be included in the guidelines, it must emerge as a major factor in a majority of the cases within a particular category.

Limitations

This study is based primarily on the arbitration cases published in the Labor Arbitration Reports. The Bureau of National Affairs compiles these cases from various sources, including federal and state arbitration bodies, private arbitrators, parties to arbitration, and attorneys representing parties. It should be pointed out that all arbitration cases are not reported in the Labor Arbitration Reports. It is generally assumed, however, that the reported cases are representative of all geographic locations, industry types, occupational groups, and major causes for discharge.

Significance

Recent laws, contracts, judicial decisions, and public opinion indicate an increasing concern for employee protection
from unfair dismissal in the United States. It is becoming increasingly important that management in both union and non-union firms be made aware of the legal limitations and accepted practices which affect management's right to discharge. This right is not unrestricted, but is subject to "just cause" and "reasonableness" considerations and the terms of any existing collective bargaining agreement (1, p. 10).

Fairness and good managerial practice dictate that the employee's right to his or her job be recognized; hence, demands for the elimination of the distinction between organized and unorganized labor are becoming more frequent and insistent. According to Clyde W. Summers, a law professor and labor arbitrator, employees in the United States who are protected under collective agreements probably have more complete and sensitive security against unjust discipline, more efficient procedures, and more effective remedies than employees anywhere else in the world. But workers in the United States in nonunion companies are almost alone in having no statutory protection against unjust dismissal without notice and without cause.

Summers proposes the creation of a statutory arbitration structure similar to that provided by collective bargaining agreements. This law would provide protection from arbitrary discharge to the more than 70 percent "at will" employees in the private sector in the United States. Any employer-
employee dispute over a discharge would be channeled into the arbitration process (11, pp. 133-134).

Jack Stieber, Director of School of Labor and Industrial Relations at Michigan State University, also favors statutory protection against unfair dismissal to employees not otherwise protected by collective bargaining agreements, civil service rules, or tenure. The legislation proposed by Stieber would permit employees who have completed a specified period of probationary employment to appeal the dismissal to an arbitrator. The arbitrator could be either a government employee or selected from a panel maintained by an appropriate government agency. Arbitrators should have the same broad remedial power as they have under collective agreements. In order to encourage resolving disputes before they reach arbitration, government mediators should be available to assist the parties. Stieber believes that statutory protection along these lines would contribute to the extension of industrial democracy to all employees in the United States (10, pp. 239-240).

Summers maintains that management is socially obligated to guarantee individual rights and provide fair procedures to all employees. Although most employers try to be fair and honestly believe that they are fair, their employees often do not share that belief. Employees doubt that the facts will be fully developed and their interests fairly weighed apart from a full hearing before an impartial
tribunal. In the absence of a collective agreement, disciplinary actions are seldom tested before a neutral arbitrator (11, p. 133).

Whether or not statutory protection is provided, management should be particularly sensitive and responsive to the employee's right to his or her job. Thus, a well-developed disciplinary program that incorporates fairness, justice, and due process and reflects a genuine concern for employee rights is vital.

In part, this study derives its significance from its potential contribution to the identification of sound dismissal policies and procedures that will benefit both employees and employers. Since it may become necessary in the normal course of events to discharge unsatisfactory employees, employers need a certain amount of freedom and authority in order to maintain personnel effectiveness and operate an efficient and profitable business. At the same time, however, workers need protection from arbitrary and discriminatory dismissal.

A major outcome of this research is the development of a model set of guidelines that meets the requirements of substantive and procedural criteria. The guidelines are equally useful to union and nonunion companies as they seek effective solutions to the perplexing problems of employee discharge. All managers and supervisors must be educated and trained to handle discharges properly; therefore, the
results of this research should be of interest to anyone responsible for training and development programs. The use of these guidelines will benefit both employees and employers. Employees will be protected from unfair dismissal, and employers will be protected from charges of arbitrary and discriminatory practices when discharge is justified.

Basic Assumptions

1. Sufficient information for developing a model set of guidelines to assist companies in the proper handling of discharge cases is available in Labor Arbitration Reports from March 1, 1978, to March 1, 1980, in recent court cases challenging the dismissal action of employers, and in related literature.

2. The cases reported in Labor Arbitration Reports will be representative of all geographical locations, industry types, occupational groups, and major causes for dismissal, and thus the findings and conclusions will be applicable to all employees and employers.

Organization of the Study

This study is organized as follows: Chapter II presents a general discussion of past and recent developments in employee discharges as reported in related studies. Chapter III considers many of the concepts and criteria that have been applied by arbitrators in discharge cases. In Chapter IV arbitration and judicial awards are classified according
to the various types of misconduct and analyzed to determine the substantive and procedural criteria held by arbitrators and courts to be sound and proper. The conclusions as well as the recommendations for the proper handling of discharge cases are presented in Chapter V.
CHAPTER I BIBLIOGRAPHY


CHAPTER II

REVIEW OF RELATED STUDIES

Extensive computer and manual searches of the literature reveal that little formal research has been done concerning employee discipline and the arbitration process. An examination of the Comprehensive Dissertation Index from 1861 through 1979 disclosed that three doctoral dissertations have been published on the subject of employee discharge and arbitration awards, and one has been done on the discharge of nonrepresented employees.

The most recent study by Krishna Kool (1976) reviewed discharge cases reported in Labor Arbitration Reports from April 1956 to August 1973 to determine (a) the statistical distribution of discharge cases on the basis of their final outcome, and (b) factors and criteria which generally govern arbitral decision making in discharge cases. Kool's study parallels in some respects the study conducted by J. Fred Holly and Joseph Charles Honeycutt and provided further testing of the validity of the conclusions of their studies (5, pp. 5 and 7).

In 1952, Honeycutt studied 762 discharge cases dating from January 1942 to August 1951 (4, p. 196). Holly, who supervised Honeycutt's study for a master's thesis, expanded
the research to include 293 additional discharge cases through March 1956. Of these 1,055 discharge cases, Honeycutt and Holly found that more than half of the discharge penalties were either revoked or reduced; however, the employer's sustained rate was higher in the latter years.

Holly's conclusions indicate that the following criteria weighed heavily in the arbitrators' decisions.

1. Management policies must be both known and reasonable for alleged violation of plant rules.

2. The employer must prove the violation of these policies.

3. These policies and rules must be consistently applied.

4. When employees are subject to work standards, the standards must be reasonable.

5. The training provided employees must be adequate when the discharge is for inefficiency.

6. Employee job rights must be protected from arbitrary, capricious, or discriminatory action.

7. The actions of management must be impersonal and based on fact.

8. Where the contract speaks, it is the authority (3, p. 16).

Kool's review of 1,962 awards revealed that the discharge penalty was upheld in 45.2 percent of the cases but was mitigated in the remaining 54.8 percent. The results of this
study point to a certain set of commonly used principles which govern arbitral decision making. Arbitrators have generally applied two primary concepts in their evaluation of the discharge penalty—the doctrine of just cause and corrective discipline. Just cause requires that administration of discipline must not be arbitrary, capricious, discriminatory, or unreasonable. Corrective discipline is to be applied when there is hope for remedial rather than punitive action. Discharge is to be used only as a last resort after measures of progressive discipline have failed to produce desirable results (5, pp. 165 and 173-174).

In his concluding statements, Kool points out that the body of substantive principles will continue to grow through the growth and refinement of the practice of grievance arbitration. But the real question, according to Kool, is not whether these principles are being evolved, but what they are and to what extent they should be implemented. In the final analysis it is the arbitrator who must make this judgment, given the circumstances of the individual case. Each case must be decided on its own merits; this is the most respected principle of labor arbitration (5, p. 178).

The purpose of a study by Lawrence Stessin (1959) was to draw conclusions from these questions.

1. What contribution (if any) has the arbitrator made in the establishment of criteria and standards for employee discipline in industry?
2. Have arbitrators given strong or weak support to the managerial function of control and direction of an enterprise?

3. Have labor unions through the arbitration of employee discipline cases been successful in eroding managerial power and authority over employees whose behavior is considered by the employer to be interfering with the proper functioning of an organization (6, pp. 2-3)?

The primary conclusion of this study is that the arbitrator, when dealing with discipline cases, is (1) a supporter of the managerial function; (2) a pattern-maker of a body of disciplinary policies and procedures where previously such criteria have been vague and undefined; and (3) a "friend in court" of the union concept that an employee has a vested interest in his job and that the greater the tenure, the greater must be his provocation to justify separation for disciplinary reasons (6, p. 242).

The fundamental objective of a study by John Thomas Conlon (1960) was to analyze the nature and manner of application of the procedural and substantive standards of review used by arbitrators in resolving grievance disputes over the propriety of disciplinary penalties assigned employees under collective bargaining conditions. His study revealed that, on most of the issues involved in disciplinary disputes, a prevailing consensus of arbitral opinion exists and may be identified. Thus, a body of "common law" has
evolved under which the concept of "just cause for discipline" has been defined under a wide variety of circumstances (1, p. 2).

In the absence of a specific injunction to the contrary; most arbitrators consider that the issue of cause for discipline requires a determination of three matters: (1) whether credible evidence has established a grievant guilty of the misconduct charged to him; (2) whether the facts of a case indicate a proven offender deserving of a measure of punishment; and (3) whether the penalty imposed on such an individual appears reasonable and is not seriously disproportionate to the severity of his offense. Most arbitrators therefore consider it properly within their authority to modify a penalty imposed by management when in their judgment it appears excessive under the circumstances of a case (1, pp. 224-227).

Conlon viewed his investigation as one in a continuing series of studies in the field of grievance arbitration since the prevailing views of justice and equity and of the reciprocal rights and responsibilities of managements and unions are subject to and do change over time. He recognized that the principles upon which arbitrators decide the merits of appeals for relief from discipline do not have timeless and universal applicability (1, p. 5).

John E. Tobin, a personnel administrator, has conducted considerable research concerning employee discipline and has
published his findings in a book entitled *A Positive Approach to Employee Discipline*. Tobin studied 1,149 recent arbitration cases to determine general criteria arbitrators use to determine whether or not an employee's discharge was warranted. Although the standards he identified are not new in the field of industrial relations, Tobin noted that it is surprising how often the standards are not duly considered by management in evaluating specific cases (7, p. 12).

A review of the literature reveals a scarcity of information about the discharge of employees in nonunionized firms. In 1964, Jack Allan Hill analyzed the discharge practices of employers in retailing, manufacturing, service, public utilities, and construction industries in the geographical area of Omaha, Nebraska. His primary purpose was to determine the various criteria managers and supervisors used to institute the employee discharge and the underlying sentiments which influenced the establishment of these criteria. The objective was to synthesize a body of thought that would be useful to individuals interested in sustaining personnel effectiveness in business and industry.

Hill's study revealed the following.

1. Reluctance to discharge employees existed through obstacles in company policy and the attitudes of managers and supervisors who considered employee discharge their most distasteful responsibility.
2. Little evidence of direct planning for discharging employees existed.

3. The breaking point for discharge occurred when the superior could no longer justify rationalizations to himself for not taking discharge action.

4. Notice of discharge was generally given on the day the employee was to leave the company; severance pay compensated for the suddenness of notice.

5. Hardly any company had an appeal procedure.

6. Multiple judgment entered into the discharge decision before notifying the employee.

7. Training for the discharge of employees consisted of conferences and questioning with a superior or a personnel department representative (2, pp. 162-163).

These studies as well as current periodical articles suggest the need for continual evaluation of the effectiveness of the policies and procedures used in discharging employees in both union and nonunion firms. Managers must keep in touch with the times; they must stay informed of the legal limitations and accepted practices which affect their right to discharge and protect the employee's right to his or her job.
CHAPTER II BIBLIOGRAPHY


CHAPTER III

SUBSTANTIVE AND PROCEDURAL CRITERIA
IN DISCHARGE CASES

Discharge, dismissal, termination, fire—all these words add up to the same result: Employees are banished from the workplace against their will. A discharge not only means loss of job, seniority, and other contractual benefits but also casts doubt on the employee's character and reputation and leaves an indelible mark on his or her work record. No matter how exemplary the past conduct and performance, an improper discharge will greatly hinder an employee's chances of getting another job (1, p. 10).

Reasons for Dismissal

Today workers are dismissed for reasons ranging from the bankruptcy of their employers to personal fault. Generally, there is little appeal from dismissals brought on by business failure or production cutbacks even if the worker is blameless. However, dismissals for personal reasons--incompetence, insubordination, absenteeism, tardiness, loafing, fighting, gambling, possession or use of intoxicants or drugs on the job, stealing, destroying company property, misconduct during strikes, and similar reasons--may be challenged. Thus, this study is concerned only with employees discharged for
personal fault. The reasons for personal fault discharges fall into two broad categories: discipline-related and production-related (4, p. 5).

**Discipline-Related Dismissals**

Firing an employee in an organization for violating rules or policies appears to be a simple matter at first glance. All the supervisor has to do is observe and note infractions and then take appropriate action. Many companies, however, do not have clearly stated, well-formulated policies or rules to cover the behavior of their employees. Or if they do, the rules and policies are not enforced consistently. Also, there are complications in dealing with "problem" employees or cases involving extenuating circumstances.

If supervisors clearly formulated and communicated definitions of punishable infractions and disciplined employees every time they committed a punishable infraction, the employees would know at all times where they stand. Guidelines regarding the total number of convictions and punishments for various infractions employees should be allowed before they are fired would be invaluable to both the supervisor and the employees. But many cases are blurred by circumstances and must be decided individually by the supervisor or manager (6, p. 55).
Production-Related Dismissals

Several situations can lead to dismissing employees for production-related causes: (1) Failure to prove their competence during the probationary period; (2) Passing the probationary period but later failing to perform satisfactorily because of technological or organizational changes; (3) Being promoted or transferred to jobs they cannot handle; (4) A change of attitude or health that adversely affects the employees' willingness or ability to work; or (5) Developing personality conflicts with supervisors, peer workers, or subordinates which adversely affect production.

For morale reasons and for the practical advantage of a flexible, well-trained workforce, companies might consider firing for production-related causes only after employees have been unsuccessfully transferred to other jobs and after all possibilities for retraining or "resocialization" have been exhausted (6, p. 58).

Whatever reason is given for the dismissal, the fired worker may feel discriminated against, particularly if discharge actions appear to affect only members of his or her group, i.e., racial, ethnic, religious, sex, age. Employers are likely to be more upset than in the usually disputed dismissal because of the charge of prejudice and unfairness. Because of the seriousness of the discharge penalty, the burden of proof lies more heavily on management (4, p. 5).
Burden and Quantum of Proof Requirements

A generally accepted principle in the employer-employee relationship, even where no bargaining agreement exists, is that the employer shall not dismiss an employee without cause. Many types of misconduct have met the "just cause" requirements for discharge. In some cases the arbitrator considers the misconduct sufficiently serious to justify dismissal for the first offense even in the face of mitigating circumstances. In a majority of the cases, however, there is no such "automatic basis" for discharge; and all factors relevant to the situation are considered by the arbitrator in determining whether the employee deserved discharge, some lesser penalty, or no penalty at all. Thus, depending upon the facts and circumstances of each individual case, the company's discharge action may be upheld, modified, or overturned (2, p. 651).

There are two areas of proof in dismissal arbitration cases. The first involves proof of wrongdoing; the second concerns the question of whether the discharge should be upheld or modified if guilt of wrongdoing is established and the arbitrator has the power to modify penalties (2, p. 621).

The arbitrator must determine if the labor contract has been followed, and labor and management must provide the evidence. Typical questions that must be answered include the following. Was the contract violated? Did management go
as far as reasonably possible to correct or change the undesirable behavior of the employee? Were there mitigating factors?

Although management is largely responsible for proving a "just cause" for discharge, the required quantum of proof is unsettled. Depending on the case, three degrees of proof are required: preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt (9, p. 799).

The strictest quantum of proof required in discharge cases is "proof beyond a reasonable doubt." Generally, arbitrators agree that this standard should be applied only in those cases where the employee was discharged for criminal or morally reprehensible conduct. Where an employee is discharged for criminal misconduct, management may be required to prove by a high degree of proof both the commission of the act and the existence of criminal intent. Arbitrators feel the higher burden of proof is justified by the social stigma that is attached to the worker. Other arbitrators, however, have criticized the "beyond a reasonable doubt" requirement (3, pp. 205-206).

The minimum quantum of proof acceptable in most arbitration cases is "preponderance of the evidence" rule. Abstractly, this test requires the party bearing the burden of persuasion to convince the arbitrator that its version of the facts is correct. This test has been applied in a great many arbitral contexts and appears to be the criterion used
in the countless cases in which burden of proof is never mentioned.

Somewhere between "preponderance of the evidence" and "beyond a reasonable doubt" is a third evidentiary standard sometimes used by arbitrators. This may be referred to as the "clear and convincing evidence" rule. The "clear and convincing evidence" standard finds its most frequent application in cases involving some sort of reprehensible conduct on the part of the company, such as discrimination (3, p. 208).

Once cause for discipline has been established, the arbitrator's authority to change the amount of the discipline is often a hotly contested issue. The debate involves the question of whether the agreement (1) limits the arbitrator to either uphold the discipline imposed by the management or make the employee whole by reinstatement with full back pay, even though cause for some discipline exists but is not sufficient cause for discharge, or (2) grants the arbitrator the remedial power to direct some intermediate form of penalty (3, p. 282).

Many agreements specify that the arbitrator has the authority to modify penalties, while others give such authority by implication. Some agreements, however, expressly limit the arbitrator's authority to modify penalties. Such agreements have resulted in a sustained discharge rather than a reduced penalty because of the limitation upon
the arbitrator's authority. In other instances the limited arbitral authority has resulted in the reinstatement of employees with no penalty even though the employee was guilty of misconduct justifying some punishment. If the agreement fails to deal with the question, the arbitrator's authority to modify penalties may be deemed to be inherent in deciding the sufficiency of cause (2, p. 628).

One general limitation on the remedial powers of the arbitrator to reduce the discipline imposed is the principle that an arbitrator should not substitute his judgment and discretion for that of management unless the arbitrator finds that the discipline imposed was arbitrary, capricious, or discriminatory. Some arbitrators do not accept this limitation on their right to modify the penalty. Instead they hold that where the agreement does not specifically limit the arbitrator's power, he may substitute his own judgment and modify the amount of discipline even if it was not found to be an arbitrary, capricious, or discriminatory penalty (3, pp. 284-285).

As a practical matter, the decisions of arbitrators who express their remedial authority more broadly than those who accept the limitation that they can modify the amount of discipline only if it is arbitrary, capricious, or discriminatory may not differ significantly. When the arbitrator finds that the disciplinary action taken by management is unjustified, he can find that management acted in a capricious
or arbitrary manner and reach the same result as one who has the authority to modify the amount of discipline without such finding. The difference in approach may be one of semantics only (3, p. 286).

Arbitrator Carroll R. Daugherty has developed a set of guidelines to assist in determining whether the arbitrator should substitute his judgment for that of the employer. A "no" answer to any one or more of the following questions usually suggests that just cause did not exist, in which case the arbitrator is justified in substituting his judgment for that of the employer.

1. Did the employee have forewarning of the possible consequences of his conduct?

2. Was the company rule reasonably related to the orderly, efficient, and safe operation of the business?

3. Did the company make an effort before administering the discipline to determine whether the employee did in fact violate the rule?

4. Did the company make a fair and objective investigation?

5. Did the company obtain substantial evidence or proof that the employee was guilty as charged?

6. Were the company rules, orders, and penalties applied without discrimination to all employees?
7. Was the degree of discipline reasonably related to the seriousness of the proven offense and to the employee's record with the company (8, p. 515)?

The answers to these questions are to be found in the evidence presented to the arbitrator during the hearing of a specific case. Since each case hinges on its own particular facts and circumstances, Daugherty's guidelines cannot be applied with slide rule precision.

Procedural Requirements

Many labor contracts now specify procedural requirements for discharge. In many cases arbitrators have refused to uphold management's action in discharging an employee where management failed to fulfill some procedural requirement stated in the agreement, such as a required statement of charges against the employee, or a notice or investigation requirement, or a hearing before assessing the penalty, or the implementation of the company's progressive discipline system. Even without specific contractual provision, certain procedural safeguards have evolved from the awards in discharge cases (2, p. 633).

Arbitrators consider many factors in evaluating the discharge procedures followed by management. The more prominent of these factors are discussed below.
**Fair Investigation and Due Process**

Discharge decisions by management have been reversed where such decisions violated the basic ideas of fairness and due process. Since the employer's action must be impersonal and based on fact, it is wise in some instances to suspend the employee for 24 to 72 hours while management conducts a thorough investigation. Such a procedure prevents the hasty discharge of an employee without a complete knowledge of the facts and without full reflection by the company.

The employee should be told the nature of the offense and given an opportunity to ask questions and give his version of the circumstances surrounding the alleged offense. Other supervisors and employees who know anything about the alleged misconduct should be interviewed. A discharge decision should be made only after all the pertinent factors surrounding an employee offense have been reviewed (5, pp. 4-7).

**Postdischarge Conduct or Charges**

Some agreements state that workers are to be informed of all reasons for the discharge decision at the time of discharge. With or without such contractual provisions, arbitrators have held that only evidence bearing on the charges made at the time of discharge should be considered in determining the existence of cause for punishment. Arbitrator James T. Burke reasoned: "The only relevant evidence
are (sic) the facts which the person making the discharge was in possession of at the time he acted" (2, pp. 634-635).

In some other cases the arbitrator did consider postdischarge misconduct or predischarge misconduct of which the company was unaware until after the discharge. In some of these cases the arbitrator qualified such consideration by stating that the misconduct could not be used to justify the discharge but could be used to determine the extent to which the penalty should be modified, if at all. Arbitrators also note that the discovery of new information or the postdischarge actions of the grievant may be considered in his favor as well (2, p. 635).

**Knowledge of Rules**

Rules as well as the penalties for violations must be communicated to and understood by employees. Unless the conduct is so clearly wrong that specific reference is not necessary, the wise employer will put the plant rules in writing, widely disseminate the rules and penalties for violations, and make every effort to insure that employees understand that a certain kind of conduct is wrong and will be penalized. Charges have been rejected by arbitrators because the employer did not make it clear to all employees that certain violations may call for discharge (7, pp. 20-21).
**Warnings**

Arbitrators generally uphold discharges for general misconduct as long as the employee was adequately warned of all offenses which collectively make him or her unacceptable. Arbitrators are more likely to uphold discharges for an accumulation of numerous minor infractions (if there have been adequate warnings) than for other more serious offenses. Arbitrators agree that a company may consider the total conduct of an employee.

Companies make the mistake of not giving a warning letter for a generally unacceptable work record resulting from an accumulation of minor offenses, none of which in themselves would justify even a warning letter. The company should always confront the employee as violations occur, not months or years later. Even if a worker's offenses are obvious and blatant, the arbitrator may not uphold the dismissal if sufficient warning is not given (7, pp. 22-23).

**Lax Enforcement of Rules**

Arbitrators have not hesitated to overturn a discharge penalty, assessed without clear and timely warning, where the employer over a period of time had overlooked past misconduct. Since lax enforcement of rules may lead employees to believe that the conduct in question is acceptable, arbitrators maintain that it is unjust to base a discharge on an accumulation of undisciplined infractions.
Although previously lax in enforcing rules, an employer can turn to strict enforcement after giving clear notice of the intent to do so. Moreover, the arbitration of a case involving discharge for violation of a rule serves clear notice to the employees for the future that the employer considers the particular type of misconduct to be a dischargeable offense (2, p. 643).

Unequal or Discriminatory Treatment

Enforcement of rules and assessment of discipline must be exercised in a consistent and nondiscriminatory manner. Penalizing one employee more severely than another equally guilty employee is not allowable unless there are mitigating circumstances. An offense may be mitigated by the employee's past record and length of service, but this does not mean that an employee with a good record and long service is exempt from summary discharge. Just as a good past record may mitigate the offense, a poor record may aggravate it (2, p. 638).

Long service with the company, particularly if unblemished, is a definite plus for the employee when discharge is reviewed through arbitration. Arbitrators have recognized that the loss of seniority may work great hardship on the employee as well as create disharmony between other workers and management (2, p. 641).
Variations in penalties do not necessarily mean that management's action has been improper or discriminatory. Arbitrators have permitted variations in penalties where a reasonable basis for variations does exist. When finding different degrees of fault among participants, arbitrators themselves have sometimes reduced the penalties that were assessed uniformly by management (2, pp. 644 and 646).
CHAPTER III BIBLIOGRAPHY


CHAPTER IV

ARBITRAL AND JUDICIAL STANDARDS

IN DISCHARGE CASES

Whenever management is involved with labor, there will be labor-management relations problems—violation of company rules, incompetence and negligence, insubordination, unauthorized union activities, and other unacceptable practices. Although companies have reserved the right to discipline and discharge, they must comply with collective bargaining agreements and federal and state labor relations laws in the formulation and administration of disciplinary rules and procedures. It is therefore necessary for companies to develop programs that not only will reduce these problems but also will meet arbitral and judicial standards in discharge cases.

The findings of earlier studies point to a set of commonly used principles which have evolved through the arbitration process; however, these principles are not regarded as binding precedents since the decision of the arbitrator depends upon the facts and circumstances of each individual case. Since employees in nonunion companies are taking their grievances to the National Labor Relations Board or to the courts for resolution, the decisions of the Board and the courts are also forming an important body of case
law. A review of recent awards reveals the importance attached to these principles by contemporary arbitrators and judges as well as the impact of current values and attitudes and the expanding legal and contractual requirements upon arbitral and judicial decisions.

The 332 arbitration cases resulting in 351 awards and the 29 court cases have been divided into the following categories for analysis and discussion: (1) Violation of Company Rules, (2) Incompetence and Negligence, (3) Insubordination, (4) Union Activities, and (5) Other Offenses.

Violation of Company Rules

Management has the right to establish rules that are reasonable and consistent with the law and the collective bargaining agreement. Even if an agreement does not specifically state company rules, management may formulate and enforce rules that will contribute to the orderly and efficient operation of the business.

When an employee has been discharged for violating company rules, the primary question in determining just cause is whether the rules are reasonable. It should be noted that company rules must be reasonable, not only in their content but also in their application. For instance, Arbitrator Daniel M. Seifer ruled that

Penalty of discharge was too severe for employee who stopped work before sound of quitting bell for lunchtime in violation of rule requiring employees to work until sound of quitting bell . . . since
(1) reasonableness of rule requires that rule be applied to all employees in similar manner and that employee be able to hear "sound of the quitting bell" when it rings, but on date of incident, three other employees were given written warning as because they each had verbal warnings and four other employees were given written warnings which later were rescinded (sic), and noise level in plant casts doubt on employees' ability to hear bell, . . . (220).

Employers frequently discharge workers for violating company rules. The frequency of discharge for the violation of company rules is not surprising since this category covers rules pertaining to absenteeism and tardiness, possession and use of alcohol and drugs on company premises, fighting, stealing, vandalism, sleeping on the job, striking a foreman, falsification of company records, and similar employee behavior.

A total of 213 arbitral awards and 13 judicial awards was analyzed in this category. These awards constitute 60.7 percent of the 351 arbitration awards and 44.8 percent of the judicial awards in all of the categories included in this study. The statistical summary in Table I shows the number and percent of discharges that were upheld, modified, or overturned and the extent to which the final decisions were influenced by substantive or procedural or both substantive and procedural criteria.

The arbitral awards show that management met the burden of proving just cause for discharge in 67 of the 213 cases, or 31.5 percent. In 39 cases, or 18.3 percent, management's action was upheld on both substantive and procedural grounds.
### TABLE I
**Arbitral and Judicial Awards in Discharge Cases for Violation of Company Rules** *

<table>
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<tr>
<th></th>
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<th>Procedural</th>
<th>Substantive and Procedural</th>
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<tr>
<td>Modified</td>
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<td>17.8</td>
<td>13</td>
<td>6.1</td>
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<tr>
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<td>28</td>
<td>13.1</td>
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<tr>
<td>Modified</td>
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<td><strong>Total</strong></td>
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*Source: Compiled from labor arbitration and court cases reported in various reporting services from 1970-1980.*
Of the 69 cases in which the discharge penalty was modified, 38 cases, or 17.8 percent, were not upheld because of substantive defects; 13 cases, or 6.1 percent, failed to meet procedural criteria; and 18 cases, or 8.5 percent, violated both substantive and procedural standards. The arbitrator decided that though a penalty was merited, the discharge penalty was too severe. In most of these cases, the awards provided for reinstatement with full seniority rights, but only 5 of the 67 awarded any pack pay. The arbitrator's award completely overturned management's action in 38 cases, or 17.8 percent; and the employees were reinstated to their former positions with full seniority, back pay, and other contractual benefits. Of these 38 cases, 28, or 13.1 percent, did not meet the just cause standards; and 10, or 4.7 percent, failed to meet both the just cause and procedural standards.

The judicial award summary shows that management's action was upheld in 9 of the 13 cases, or 69.2 percent, and was overturned completely in the other 4 cases, or 30.8 percent. Of these, 6, or 46.2 percent, met the just cause requirement and 3, or 23.1 percent, complied with both the just cause and procedural criteria. The court decisions overturning the discharges cited substantive defects in 3 cases, or 23.1 percent, and both substantive and procedural defects in the remaining case, or 7.6 percent. In each of these 4 cases reinstatement with back pay was awarded.
Some violations of company rules are viewed as being more serious than others. Depending upon the seriousness of the offense, different arbitral and judicial standards are usually applied in determining the appropriateness of the discharge penalty. Consequently, the discussion of awards for violation of company rules is divided into two parts. The first part analyzes the circumstances under which employees have been held justly or unjustly penalized for serious offenses of company rules. The second section includes those cases in which the appropriateness of the discharge penalty has been questioned for less serious offenses.

**Serious Offenses**

Extremely serious offenses such as using drugs and alcohol on the job, striking a supervisor, fighting, and theft may warrant summary discharge with no prior warning or attempts at corrective discipline required. Discharge for one of these reasons is especially serious since the employee's present job, future job opportunities, and reputation are at stake.

**Dishonesty.**—No one questions management's right to discipline workers for any one of a number of dishonest acts committed within the scope of their employment. Various types of dishonest acts leading to discharge include theft, falsification of application blanks and other company
records, bribery, lying, and disloyalty. The discharge penalty is most likely to stand if the evidence is sufficient to establish guilt beyond a reasonable doubt. Many arbitrators will uphold a discharge if the company meets the preponderance of evidence standard.

A total of 39 awards dealt with dishonest practices, and the discharge penalty was upheld in 26 of them. The discharge was modified in 6 cases and completely overturned in the remaining 7 cases.

There appears to be rather widespread agreement among arbitrators and judges that discharge is a just penalty for workers who are proven guilty of taking company documents (202), taking company-owned tools (46), engaging in food stamp fraud (97), advancing time clock (159), soliciting and accepting kickbacks (19), cheating on incentive system (31), and various other dishonest practices (68, 72, 110, 133). In these and other dishonesty cases, the following employer practices were influential factors in upholding the punishment meted out by the company:

1. A thorough and fair investigation including due process to establish proof of guilt;

2. Careful consideration to all circumstances of the case;

3. Clear communication of the rule as well as the penalty for violation;
4. Consistent application of discipline for violation.

The principle of progressive discipline was not applicable in these cases. Generally, the employee's prior work record and length of service were not taken into consideration in determining the outcome of the case.

A few of the discharges were converted to suspensions without pay primarily because the employer did not make an adequate effort to ascertain facts of the case (47) and failed to establish clearly that employee acted with criminal intent (179). The discharge of an employee for allegedly removing a 67-cent bag of peanuts from its display peg in the retail store was reduced to a 90-day suspension. Although the employee signed a prepared statement admitting that he took the peanuts, the arbitrator was convinced that the theft was not deliberate (126).

Lack of evidence was the major reason for overturning the discharge actions of employers. An employee charged with theft was reinstated with full back pay and seniority. In discussing the case, Arbitrator Perry stated:

Although the employer has right to discharge employee for theft, it failed to prove its case by clear and convincing evidence and certainly failed to prove beyond reasonable doubt that grievant stole money as customer had testified (187).

Another discharge was overturned because there was no evidence that "grievant was dipping into coin box or had put his hand into coin box" or that he was not going to tell guard of unlocked machine and/or turn money over to the guard
as he had testified. In rendering his decision, Arbitrator Schor made these statements:

To support charge of stealing, a great deal more must be proved by the accuser than would be required were the charge a lesser included violation. To prove stealing, it is a requirement that the above-described element of criminal intent be proved (83).

Discharge for falsification of the employment application is fairly common. The employee will probably be reinstated unless the employer can show a willful attempt to conceal information. Two cases in particular forcefully illustrate this point. In one instance an employee did not reveal on the application that he had been convicted on two charges because his attorney told him the charges would be expunged from the record at the end of one year when, in fact, they had not been expunged after the lapse of several years. The arbitrator ordered reinstatement with full back pay and seniority since falsification was unintentional (217). Another employee was discharged because he failed to list an industrial injury he had sustained while working for a previous employer. The employee testified that he had forgotten the injury that had happened ten years earlier. The arbitrator concluded that the "falsification" was inadvertent and ordered reinstatement (63).

Employees may also be discharged for falsifying other types of company records. For example, General Electric Company proved that an incentive worker was guilty of operating a scheme to obtain double payment. The computer cards
used to claim payment twice were found in the employee's locker (88). Another employee of General Electric was discharged for giving false information concerning work that had been done. There was sufficient evidence to uphold the discharge; however, the arbitrator asked that the employee be allowed to resign since past practice in the company permitted resignation for falsification of records (85).

Employees are sometimes dismissed from their jobs for disloyal practices. A discharge is likely to be upheld if the act has a detrimental effect upon the company's reputation, business, or products. An employee was discharged for reports to a federal agency of alleged unsafe equipment that resulted in an unusual increase in the number of citations issued to the employer. The arbitrator declared the discharge proper "since making a report containing statements that basically were untrue in addition to failure of employee to use agreement, which was proper channel for reporting defects in equipment, constitutes malicious act" (70). According to Arbitrator Axon, an employer had just cause to discharge mechanics who were soliciting business from employer's customers on company time and premises and were doing work in their private repair shop in competition with employer (2).

Avco Corporation dismissed an employee on the grounds that an article he had written criticizing the company violated a plant conduct rule. The employee argued, and his
position was upheld, that his discharge was not for just cause because the discharge arose from his exercising his First Amendment rights. The court held that interference with the employee's right of free speech was unwarranted since the article was neither defamatory nor suggested wild-cat strikes (111).

Disorderly conduct.--The discharge of employees for various types of disorderly conduct is an issue which has often been arbitrated. Employees who fight with co-workers, assault supervisors, vandalize property, harass co-workers, and bring weapons onto company property can expect to be punished. Many labor contracts prohibit such behavior and even provide for summary discharge in many instances. Of the 40 awards dealing with disorderly conduct, 19 discharges were upheld; 14, modified, and 7, overturned.

In arbitration, persuasive evidence that the grievant initially provoked and aggressively pursued a fight typically has been ruled just and sufficient grounds for discharge (103). General Electric Company established that two employees were deserving of discharge for fighting each other since each employee acted intentionally and with inappropriate aggressiveness toward the other (89).

Conversely, Arbitrator Carver reduced the discharge to a suspension since the grievant's attack was provoked by the other party and was not unusually violent or depraved (86).
Other factors that served to mitigate the discharge in this case, as well as in others, are the employee's record of employment and a contrite attitude.

When an employee acts in a reasonable manner in self-defense, the discharge penalty is not justified. A grievant who responded with two quick punches to a leadman's chin and forehead after being punched in the face was reinstated to his former position with full seniority, back pay, and other benefits. The arbitrator observed:

Two quick punches cannot be considered higher degree of force than appeared reasonably necessary at moment, and grievant merely acted in self-defense; assuming that grievant was obligated to withdraw, retreat virtually was impossible because his back was pressed against door leading into small office, and he had good reason to fear additional bodily injury (121).

The discharge of a police officer for assaulting a man was overturned because his guilt was never established. The assault became the subject of criminal prosecution for assault and battery and ended with the jury finding the grievant not guilty (45).

In the absence of provocation or any other mitigating circumstances, arbitrators find that summary dismissal is just and proper discipline for assaulting a supervisor (57, 60, 76, 218). Although summarily dismissed for assault, the employees may have received prior warnings for lesser offenses. A union steward discharged for cursing a manager and shoving him into a desk during an argument over his work schedule had been given two earlier warnings for being
disrespectful to the manager within hearing of other employees on one occasion and for insulting the assistant manager on another (78).

It is quite possible, on the other hand, for the supervisor to provoke the assault. Suspension instead of discharge seemed to be a more appropriate penalty for a minority group employee who struck his supervisor for directing racial slurs at him. Investigation of the case revealed that the supervisor had been transferred from second shift to day shift because of complaints regarding his use of racial slurs and obscenities (140).

Sometimes, but only under unusual circumstances, an arbitrator will rule an assault on a supervisor insufficient grounds for discharge. Arbitrator Golob considered past records and plant circumstances in his award to reinstate an employee who fought the shop chairman and subsequently threatened the general manager. Golob pointed out that the grievant merely lost his temper on a particular day and discharge was too harsh, particularly since he had thirteen years of service and only one warning in his record (11).

Willful destruction of the property of another employee or of the company is a dischargeable offense in most instances. Five discharge cases for vandalizing property were upheld (5, 35, 156, 157, 234). In a case where the grievant was discharged for vandalizing his supervisor's home, the arbitrator sustained the grievance because the grievant's
friend was the primary instigator of the incidents. The fact that the grievant had a reasonably good work record for four years was also a factor in the arbitrator's decision (52).

The principle of progressive discipline emerges as an important consideration in cases concerning harassment of co-workers. In the cases that were upheld, progressive discipline had been applied. The management at Potlatch Corporation had issued three oral warnings and a thirty-day suspension prior to discharging the union president for harassing fellow employees (180). In other situations the discharge penalty was modified because (1) the employer failed to impose any disciplinary sanctions against the employee despite his repeated and objectionable conduct (42), and (2) the employer failed to timely advise the grievant of a customer's complaints and permit him to defend himself against them prior to summarily discharging him on the basis of those complaints (207).

Harassment cases were overturned because they failed to meet both substantive and procedural standards required for discharge. Duro-Vent Corporation discharged an employee for allegedly threatening another employee. However, the arbitrator overturned the penalty for these reasons: (1) lack of evidence, (2) denial of due process rights, and (3) no plan for progressive discipline (62). Arbitrator Lovell overturned a discharge because of insufficient evidence that an employee made threatening remarks to a supervisor. And in
this arbitrator's opinion, progressive discipline that applies to other offenses should be applied as well to employees who make uncomplimentary remarks to or unfounded accusations against their supervisors (135).

Although companies have rules prohibiting the possession of weapons on company property, they are lax in enforcing the rules (99), show disparity in treatment in assessing penalty (177), and do not make a proper investigation (41). As a result, arbitrators frequently reduce the discharge to a suspension or reinstate the employee with full back pay, seniority, and other benefits. The employee's disciplinary record and length of service are frequently considered by arbitrators in determining the appropriate penalty.

Use and/or possession of drugs and alcohol.—Employees who come to work under the influence of drugs or alcohol, who use drugs or alcohol while at work, or who bring drugs or alcohol onto company premises are subject to severe penalty. The right of employers to discharge employees for use and/or possession of drugs and alcohol has been strongly affirmed in arbitration. At the same time, however, arbitrators have often found that discharge is an inappropriate penalty.

It appears that drug-related offenses are occurring much more frequently today than those relating to alcohol. Arbitrators handled 28 grievances for drug violations as compared to only 6 for alcohol. Of those pertaining to drugs, 11
discharges were upheld, 8 were modified, and 9 were overturned completely. For the ones concerning alcohol, arbitrators upheld 3, modified 2, and overturned 1.

When employees are charged with possession or use of narcotics, there must be "clear and convincing proof." Since General Telephone Company failed to meet this standard, Arbitrator Richman overturned a discharge that was based on a co-employee's unsupported testimony that the grievant had smoked marijuana in his presence while driving on business.

In his discussion of the case, Arbitrator Richman made these comments:

Standard of proof needed to sustain discharge of employee for alleged "use of drugs on the job" is clear and convincing evidence standard, which is less than beyond reasonable doubt standard but more than ordinary prima facie case and preponderance test, since imposition of lesser burden than clear and convincing proof fails to give consideration to harsh effects of summary discharge upon employee in terms of future employment (91).

Other discharges have been overturned for the same reason. In another case the testimony of the grievants denying the sale or use of marijuana was accepted over an undercover agent's uncorroborated reports. In ruling on the case, the arbitrator noted that although the testimony of the agent seemed forthright, it must fall if it stands alone (173).

Although it is not always easy to prove a drug violation, many discharges are sustained on the basis of a confession by
the offending party (38) or the testimony of a witness along with supporting evidence, i.e., the substance itself (99).

The following cases illustrate a number of extenuating circumstances that are considered when making a judgment concerning what penalty, if any, should be assessed. In each of these cases the arbitrator determined that no penalty was warranted.

1. Discharge was improper since employee was not "on call" nor under power or control of employer at the time of her arrest by narcotics squad for possession of marijuana (144).

2. The discharge of an employee for sharing marijuana cookies with his co-workers was unjust since there was insufficient proof that employee knew the cookies baked by his girlfriend contained marijuana (124).

3. Employer did not have just cause to discharge employee who denied knowledge of presence of marijuana that police officer had found in her luggage since there was reasonable doubt that she did in fact know that drug was in her possession (29).

In the following cases the arbitrator ruled that although the grievant was deserving of punishment, discharge was too harsh.

1. Use or possession of drugs off company premises is not as serious as misconduct on company premises (160).

2. "Possession" of marijuana is of different and lesser order of seriousness from "use" or "sale" which rules prohibit, and evidence does not support that grievant used or sold drugs (98).

3. Mere possession of pills is not a crime and is not against any company rule. A chemical test revealed that the pills were not a controlled substance (209).
4. A 50 percent probability that grievant was the one of two employees who flipped a marijuana cigarette butt is not quantum of proof required to justify termination (213).

Arbitral decisions also point to the importance of procedural issues in assessing the discipline for violating company rules for drug use and/or possession. In two of the awards in which the discharge was upheld, the arbitrator stressed that the employer had investigated the matter fairly and thoroughly (233), and that the employer's discharge of other employees on two separate occasions establishes consistent response to violation of company rules (53).

An employee proven guilty of selling drugs to other employees on company premises was reinstated solely on procedural issues. The company did not adhere to the contract provision barring discharge of employee without first giving him an opportunity to meet with the labor relations director or designated representative. The arbitrator concluded that there was no question concerning the grievant's guilt and the offense was grave enough to warrant discharge; but in the conduct of discipline, it is as important to maintain integrity of process as it is to discipline for just cause (1).

Whether the outcome of the case turns primarily on substantive or procedural issues or both, arbitrators generally give employees with an exemplary work record another chance. An employee who pleaded guilty to a felony charge of selling a controlled drug to an undercover agent was discharged for
violating the company rule pertaining to drugs. Arbitrator Yarowsky's decision to award full reinstatement was influenced by the employee's consistently good work record with no prior disciplinary problems and his acceptance into a joint apprenticeship program in which he was developing skills useful to his employer (147).

Where drinking on the job threatens the safety of employees as well as endangers company property, a discharge is likely to be upheld on the first offense (16). Employers that do not apply the rules relating to alcoholic beverages in an even-handed manner will probably have their discharge decisions altered. An employer had issued a number of warnings to an employee for drinking beer on company premises; yet, the arbitrator reinstated him with this explanation: Penalizing the employee without apprehending the other employees who violated the same rule borders on discrimination (132).

As in drug-related cases, employees with good work records are given special consideration. Arbitrator Gerber overturned the discharge of an employee who had an unblemished record of eight years with one employer. In his opinion an employer must be willing to put up with more from a long-service employee (167). This view is shared by other arbitrators who have assessed lighter penalties for intoxication.
Less Serious Offenses

Less serious infractions of plant rules include excessive absenteeism and tardiness, violation of safety rules, neglect of duties, and a variety of other matters. Generally, these offenses do not warrant discharge without adequate prior warning.

Absenteeism.—Employee absenteeism is a serious and costly problem for American industry. Not only are the direct costs of absenteeism a major concern, but the detrimental effects of absenteeism upon employee morale and industrial discipline are significant also. Most employers attempt to establish rules and regulations that will reduce overall absenteeism and free their organization of habitual absentees while meeting the just cause and procedural standards for discharge.

More grievances were filed relating to absenteeism than to any other rule violation. In fact, absenteeism cases account for 25 percent of the arbitration cases and 39 percent of the court cases falling within the violation of company rules category.

Arbitrators tend to uphold the discharge action of management when employees fail to call in and can provide no reasonable excuse for not reporting absences (28, 114, 145, 184, 204, 208). When employers provide proof that the absentee rules as stated in the contract have been violated
and the penalty for such violation is discharge, the discharge is likely to be sustained.

Unauthorized absences are also looked upon with disfavor and justify the discharge penalty in the absence of mitigating factors (13, 7). A teacher who notified the telephone receptionist that she "would not be coming to work until further notice" flagrantly violated her obligation to secure prior authorization of her absence as required under the museum's conduct rules. Arbitrator Turkus found that the grievant "callously elected to abandon her job duties and responsibilities and employer had no alternative save to terminate her or risk irreparable collapse of work force morale, discipline, and efficiency" (7).

In cases where absences are necessitated by jail confinement, arbitrators consider plant rules, effect on the operation of the business, and employee's record with the company (142, 164). Arbitrator Boyd upheld the discharge of an employee despite the union's contentions that the employer's refusal either to grant a leave of absence to the employee during his jail sentence or to cooperate with the police department on a work-release program was the direct cause for employee's failure to report to work. The contract did not require the employer to grant a leave of absence under these circumstances or to participate in a work-release program. Moreover, the employee had a 15 percent absentee record as compared with the plant average of 6 percent (161).
Generally, unless stated in the contract, jail sentence alone is not sufficient cause for discharge.

When Bethlehem Steel Corporation discharged an employee who was jailed for thirty days, Arbitrator Sharnoff upheld the discharge. A major factor in his decision was the employee's poor work record and the company's ability to provide documented evidence of progressive discipline which included one-, three-, five-, and ten-day suspensions for absenteeism over a three-year period (21).

A court of appeals upheld a federal trial court's determination that the hospital was justified in discharging a black nurse's aid for failure to report to work. The hospital met the burden of proving that the reason for discharge was absenteeism, not racial discrimination (12).

Arbitrators are much more lenient toward absenteeism where health problems are involved. Discharge is considered a cruel and undeserved penalty when health is established as the underlying cause for absenteeism; consequently, the discharge penalty is frequently modified (14, 170, 193, 208) or overturned completely (6, 26, 66).

Employees with serious alcohol problems are given a great deal of consideration, especially when they are willing to participate in a rehabilitation program for alcoholics. Simply enrolling in the program serves to mitigate the discharge action (191, 222). After numerous attempts through its progressive discipline system to help an alcoholic
employee improve his attendance record, General Electric Company issued a fourth warning notice and discharged the employee under the company's code of conduct. The company introduced documents from 1968 through the date of discharge in February 1978 that substantiated a generally unsatisfactory attendance record marked by a number of contract reports, warning notices, and suspensions. The arbitrator determined that the employer had met the procedural requirements and upheld the discharge (87).

The principle of progressive discipline is a key factor in arbitral and judicial awards. Discharge decisions have been upheld repeatedly in those companies that have adhered to their progressive discipline programs. The following cases in which arbitrators sustained the discharges illustrate the importance of progressive discipline and the broad protection employees enjoy because of progressive discipline.

1. Employee was absent 20 full days and tardy 22 times, left early 6 times, and failed to call in 5 times. The practice of corrective progressive discipline in use by the company consists of a sequence of one or more of the following: oral warning, written warning, suspension, and discharge (115).

2. In addition to oral counseling, employee received three company letters prior to discharge pointing out in detail his absentee record and in each case warning him that he would be discharged if attendance did not improve (33).

3. Employee was adequately warned and given every chance to improve through company's progressive disciplinary procedure: (1) interview; (2) verbal warning; (3) written warning; (4) written warning; (5) one-week layoff; (6) discharge (81).
4. In addition to formal written warnings, numerous personal contacts were made with employee to discuss attendance problems and to counsel and caution concerning continued poor attendance. After third warning, in accordance with company's written policy, employee was given a one-week disciplinary layoff. The fourth warning, issued after six additional incidents of poor attendance, resulted in discharge. Issuance of third and fourth warning notices required authorization of the plant manager (80).

5. Within a nine-month period employee had received a written reprimand, three-day suspension, and five-day suspension prior to discharge for poor attendance and failure to give timely notification of absence (151).

6. Employee had received fourth warning notice for absenteeism and tardiness within six-month period. After his third warning, employee was absent six days and tardy nine days (89).

7. Company pursued a progressive disciplinary procedure which resulted in the employee's suspension on three separate occasions for absenteeism within four-year period preceding his discharge. Two of the three suspensions were within less than two years of the discharge (195).

8. Company followed principles of progressive discipline and repeatedly warned and gave disciplinary suspensions for absenteeism (230).

9. After repeated warnings, three-day suspension, and a ten-day suspension marking last step in progressive discipline system, the employee was discharged for absenteeism (4).

10. From her warning notice on February 22 to her termination on June 14, employee was absent 25 percent of her scheduled work time and was indifferent toward employer's request that she support the reasons given for her absences (75).

11. The progressive discipline system provides (1) warning, (2) 3-day suspension, and (3) discharge. After 14th absence employee was given a warning that the next unexcused absence would result in suspension. On fifteenth absence, she was suspended for three days with warning that the
next step is discharge. After next absence, employee was suspended subject to discharge (162).

Likewise, the importance of progressive discipline and the safeguards provided employees are evident in these court decisions upholding discharges for absenteeism.

1. Employee was frequently absent or late and failed to report absences and tardies to his employer. Progressive discipline steps were employed prior to discharge: two warnings and four suspensions from one to five days (130).

2. Employee had been informed in detail concerning the safety and plant conduct rules as well as procedures for reporting absences from work. The employee was warned repeatedly about his unacceptable attendance record (27).

3. After first unauthorized absence, employee was suspended two days and warned that a recurrence could result in discharge. The second unauthorized absence led to dismissal since his absence led to an undue hardship on employer (113).

In the absence of a progressive discipline plan, discharges for absenteeism are held improper regardless of the condition of an employee's work record. For example, the arbitrator reinstated an employee whose work history reveals a belligerent man who played while on duty, was absent many days without leave or explanation, threatened a co-worker, and was considered undesirable by the company and co-workers. The arbitrator reasoned that since the employer had been tolerating and condoning such conduct and had no published work rules and progressive discipline plan, it might be somewhat unfair to get tough without some forewarning (203).
In another situation the company demonstrated that the employee wrongfully withheld his services; yet, the arbitrator modified the discharge penalty because the company had never defined the phrase "chronic or excessive absenteeism" and had no plan for discipline (223). Similarly, Arbitrator Szollosi reinstated an employee because the company had been tolerant and passive toward absenteeism in the past and did not use progressive discipline (206).

Copperweld Steel Company failed to rebut a black employee's showing of discrimination regarding his termination for violating a "last chance agreement" under which the employee had been conditionally reinstated subject to his compliance with obligations concerning absences. The company had no standardized or uniform disciplinary procedure to deal with absenteeism and/or tardiness. Supervisory personnel subjectively defined the term "excessive" absenteeism without the benefit of any objective criteria to assist them in a uniform implementation of an absentee policy. The conclusion included this statement: "... the circuit courts have unanimously expressed concern over employer-maintained procedures wherein objective standards are lacking and decisions are delegated solely to the subjective determinations of supervisory personnel." The lack of specific and objective criteria makes a company particularly susceptible to the exercise of arbitrary discrimination (200).
Where the contract provides for progressive discipline, arbitrators are likely to reinstate employees when the procedures have not been followed explicitly. Arbitrator Allen ruled the discharge penalty was too severe for employee who had never been warned formally about his absences in compliance with the contract provision requiring use of progressive disciplinary procedures (141). Another terminated employee was assessed a lesser penalty because the employer did not impose progressive discipline as required by the contract. The arbitrator also found that the company failed to apply its rules uniformly since other employees with records of absenteeism far greater than the grievant's had not been disciplined (190).

Misunderstanding or lack of communication between the employer and employee may influence the arbitrator's award. The fact that a supervisor did not make clear to the employee that he would be discharged if he carried out his announced intentions was the basis for the arbitrator overturning the company's action (40). The discharge of an employee who allegedly violated the conditions of a rehabilitation agreement was considered unjust since management did not tell the employee that he was compelled to keep every appointment and that he was jeopardizing the effectiveness of the program by the sporadic nature of his attendance (90). Failure to specifically warn an employee that his total disciplinary problems were significantly greater than those of others in
the bottom one-third of attendance resulted in reinstatement despite the fact that the company had pursued a reasonable course of progressive discipline (197).

Complete and accurate documentation is a factor in either sustaining or setting aside a discharge. Inadequate record keeping (93) and inaccurate records (175) were cited in the arbitrators' awards as reasons for setting aside the discharges.

Safety.--For safety purposes many company rules restrict smoking in sensitive areas. Discharge for violating a no-smoking rule is upheld when the charge is based on fact instead of inference or opinion. Where a company had the burden of proving violation beyond a reasonable doubt, the supervisor's testimony that he had smelled cigarette odor from an unconfined area more than fifty feet away on the other side of the building was insufficient proof of offense (39). Other companies, however, presented sufficient evidence by eye witnesses to prove their no-smoking rules had been violated (32, 95, 215).

Unless there is proof of deliberate disregard for safety rules and procedures, arbitrators give considerable weight to the fact that employees have been warned and have received adequate instruction in safe procedures prior to discharge (25). An employee was discharged for refusing to wear safety pants because of her religion. The arbitrator's award stated
that the employer had just cause for discharge since the rule was reasonable, and evidence showed that the employee had been warned frequently and suspended three different times for one, three, and five days (51).

**Neglect of duties.**—Employees are expected to be at their work stations performing the duties of their jobs during working hours. If they neglect their job duties by sleeping on the job, leaving the work area without permission or reasonable excuse, or limiting production willfully, they may be subjected to a disciplinary penalty including discharge. Whether discharge is the appropriate penalty depends upon the individual circumstances in each case including the reasonableness of the rule, the employee's past record, and procedural factors.

Discharge was considered the proper penalty in the cases involving sleeping on the job. In each case the employee had been duly warned (37, 74, 116). Since sleeping on the job often creates hazardous conditions for the employee and his fellow workers and may result in delayed or defective shipments of products to customers, companies and arbitrators believe the discharge penalty is a just one.

On the other hand, the discharge penalty was considered too harsh in other arbitration cases relating to neglect of duties. Arbitrators reversed the discharge decision because
management failed to fulfill the following procedural requirements.

1. Employer had been inconsistent in assessing penalty for violation of rule for leaving work area without permission. The employee's 12 years of satisfactory performance with the company also influenced the decision (123).

2. Employer did not give employee an opportunity to present his side of the story or to offer evidence or names of potential witnesses to complete the company's investigation of rule violation regarding wasting of work time (231).

3. Employer did not forewarn employee that discharge would result from hiding in closet during working hours. Consideration was given to the fact that employee had established a good record during his five years with the company (225).

4. Employer had not applied rule consistently to all employees who violated rule requiring employees to work until sound of the quitting bell. Arbitrator noted that the employee had a perfect record in regard to tardiness and never missed a day's work without a legitimate excuse during 6 1/2 years with the company (220).

A court decision upheld the discharge of a solvent plant operator who violated work rules regarding notifying the shift foreman of problems in the plant, shutting down operations on the basis of his own judgment without contacting the shift foreman, being absent from his work station, and interfering with other employees during work hours. The written duties for plant solvent operators had been posted since 1973. They were plainly visible and had been seen and observed by solvent plant operators during this time (228).

In an appeal case, Gulf Oil Corporation provided sufficient evidence to support a federal trial court's conclusions
that an employee was lawfully discharged for engaging in personal real estate business activities during regular working hours (24).

Other rules.—In reviewing the remaining cases where employees were discharged for violating a variety of company rules, it is apparent that discharges were upheld in the companies that did not deviate from their progressive discipline policies. An examination of these cases reveals that progressive discipline is more than a simple warning; the procedure usually involves four or more steps prior to discharge (61, 65, 79, 125, 154, 216).

In several of the reinstatement decisions, the arbitrators emphasized that the disciplinary procedures were not strong enough to bring about an improvement in employee behavior (72, 126, 128, 163, 194). Other prominent reasons given for reinstatement were denial of due process (148), failure to properly communicate rule (82), and unfair assessment of discipline among employees (185).

There were several cases in which the company failed to prove that the discharge penalty was a just one for the offense or to provide sufficient evidence to support the alleged violation. For example, in Arbitrator Newmark's opinion the company rules did not permit summary discharge for refusing to take a sobriety test (23). Discharge was considered too severe a penalty for the 58-year-old male
employee who deliberately entered the ladies rest room because he "wanted to know what it looked like" (171). Los Alamos Constructors, Inc., had a discharge overturned because it failed to establish by a preponderance of the evidence that the employee was guilty of violating security regulations as charged (136).

Incompetence and Negligence

Employers insist that employees perform the duties of their jobs in a satisfactory manner. Management is responsible for the efficient operation of an organization; hence, it has reserved the right to discipline and discharge incompetent and negligent workers.

A total of 36 arbitral awards and 4 judicial awards involving incompetence and negligence was analyzed. These awards account for 10.3 percent of the 351 arbitration awards and 13.8 percent of the judicial awards in all of the categories included in this study. The statistical summary in Table II shows the number and percent of discharges that were upheld, modified, or overturned and the extent to which the final decisions were influenced by substantive or procedural or both substantive and procedural criteria.

The arbitral awards show that management met the burden of proving just cause for discharge in 12 of the 36 cases, or 33.3 percent. In 5 cases, or 13.9 percent, management's action was upheld on both substantive and procedural grounds.
TABLE II
ARBITRAL AND JUDICIAL AWARDS IN DISCHARGE CASES
FOR INCOMPETENCE AND NEGLIGENCE *

<table>
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<th>Awards</th>
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*Source: Compiled from labor arbitration and court cases reported in various reporting services from 1970-1980.
Of the 11 cases in which the discharge penalty was modified, 3 cases, or 8.3 percent, were not upheld because of substantive defects; 5 cases, or 13.9 percent, failed to meet procedural criteria; and 3 cases, or 8.3 percent, violated both substantive and procedural standards. The arbitrator decided that though a penalty was merited, the discharge penalty was too severe. In 10 of the 11 cases the awards provided for reinstatement with full seniority rights, and in 4 of the 11 cases some back pay was awarded the reinstated employees. The arbitrator's award completely overturned management's action in 8 cases, or 22 percent; and the employees were reinstated to their former positions with full seniority, back pay, and other contractual benefits. Of these 8 cases, 5, or 13.9 percent, did not meet the just cause standards; and 3, or 8.3 percent, failed to meet both the just cause and procedural standards.

The judicial award summary shows that management's action was upheld in the 4 cases analyzed. The just cause requirement was met in each of the cases, and the procedure followed by the company in one case was cited as an important consideration in sustaining the discharge.

In evaluating the appropriateness of the discharge penalty for incompetence and negligence, arbitrators have found it helpful to define these terms. Incompetence implies a lack of ability to perform a job to standard. The incompetent worker puts forth diligent effort, but the demands
of the job are beyond him. Negligence, on the other hand, suggests lack of proper care or attention in performing a job. The negligent or careless worker possesses the skill and ability to do the job but, either because of indifference or other cause, disregards his obligation in performing the job (226, p. 796).

Although both types of employee behavior detract from efficient production, they are distinct offenses and are dealt with separately. The discharge cases relating to incompetence will be discussed first, followed by a discussion of the cases in which workers were discharged for negligence.

**Incompetence**

Most contracts give employers the right to discharge probationary employees for any reason except discrimination. Probationary employees discharged for incompetence frequently bring charges of discrimination against their employers, and several such cases were analyzed in this study. In each of these cases, the arbitrators found that the employers did not discriminate but were justified in discharging the workers for poor work performance. Two probationary employees filed discrimination charges against Paccar, Inc., after they had been dismissed for unsatisfactory work. The arbitrator could find nothing in the record to support the black employee's claim of race discrimination; on the contrary, the evidence
established that the grievant's work had been unsatisfactory. Neither was the female employee's charge of sex discrimination upheld, since the company provided evidence to prove the employee's inability to perform her job satisfactorily (165).

Arbitrator Britton found that Amoco Oil Company was not guilty of violating the contract when it discharged a black operator trainee for not progressing properly. The evidence established that the grievant received the same instructions, directions, and training materials as the other probationary employees. The charge of race discrimination was dismissed since the evidence showed that the discharged employee received the same treatment as any other employee in the same situation (8). And Arbitrator Mewhinney ruled that Texas Utilities Generating Company had just cause for the discharge of a black employee who was not progressing satisfactorily in an entry level job of mechanics helper after having been conditionally kept beyond the end of his probationary period in order to receive special teaching. Mewhinney noted that if there was any discrimination in the case, it probably was in the nature of reverse discrimination in that the grievant was given more consideration than he would have received if he had not been black (211).

The court decisions indicate support of management's right to set reasonable standards of production both in terms of quantity and quality and to enforce the standards through discipline including discharge. The discharge of a black
foreman was upheld because of his generally poor job performance, his drinking while on the job, his failure to set a mold as instructed, and his failure to properly supervise the setting of an expensive mold to avoid damage (227). Another charge of race discrimination was denied since the employer provided specific documentation to prove that the worker was incompetent. A memo detailing the nature and extent of the employee's errors had been reviewed with her, and she had been given every opportunity to receive additional training and to prove her competence (139).

Generally, arbitrators view summary discharge an inappropriate penalty for non-probationary employees even though the work does not meet the minimum standards of performance. The number of discharges that were modified to a lesser penalty shows that arbitrators support a progressive discipline system in cases pertaining to poor job performance (20, 36, 205).

Many times discharges for incompetence are overturned because the arbitrator determines that management is partly or wholly at fault for the unacceptable performance. At Leavenworth Times, two employees who had been discharged for incompetency were reinstated. Arbitrator Bothwell determined that management had not given the employees the proper advice and counsel with regard to training (129).

In another situation, the discharge of a female construction worker was overturned. Testimony did not indicate
that the employee was warned about the consequences of her alleged lack of performance, nor was there any evidence that she was unable to perform heavy construction work since she was never asked to do anything more than spread sand in a ditch. Moreover, she had established an excellent work record in what traditionally had been considered to be a man's trade (10).

Another employee was reinstated even though there was no doubt that her performance was unsatisfactory. In studying the facts of this case, the arbitrator found that the employer had violated the contract when it did not return the employee to her former position after she failed to qualify for the new job to which she had been promoted. Permitting the employee to pass the ninety-day evaluation period in her new job indicated that the employer accepted the level of her job performance, and it cannot at a later time contend that such performance was unsatisfactory (122).

**Negligence**

In reviewing the penalty of discharge for negligence, the awards indicate that arbitrators overwhelmingly support a program of progressive discipline. One simple act of negligence usually warrants only a mild form of discipline, whereas several of these acts taken together may be deemed worthy of discharge, especially if the offender is not responding positively to the corrective discipline. In a
majority of the cases in which discharges were upheld, the employees had been disciplined many times and had been given a final warning that further neglect of duty would lead to termination.

A wing tank mechanic was discharged for negligently or willfully damaging an aircraft wing. The company had issued a number of written warnings stating in detail the infractions along with specific standards for improvement. The arbitrator concluded that the employer had just cause for discharge since the incidents, when viewed with the employee's record, demonstrated that progressive discipline failed to produce the desired results (59).

At S & T Industries, Inc., an order clerk was discharged after having received nine pink slips for carelessness in less than a month. The company issued five formal warnings with the fifth warning containing a notice of discharge. Arbitrator Madden upheld the discharge (188).

Another employee was discharged for poor job performance over a long period of time. She had been counseled, warned, suspended, and eventually placed on notice that further infraction of job performance standards would lead to her termination. In sustaining the discharge, the arbitrator said there was no question that the grievant had actual knowledge of all of the series of disciplinary actions leading up to her discharge (119).
Reynolds Metals Company complied with its progressive discipline program when it discharged an extrusion inspector for repeated acts of negligence. The employer issued a written warning on March 31, suspended the employee from August 28 through August 30, and issued a personnel action slip for a five-day suspension pending termination on August 31. After discussing the employee's performance with other company officials and the union steward, the supervisor discharged the grievant on September 12. Arbitrator Frost upheld the company's action (183).

Several of the discharges were reduced to disciplinary suspensions or overturned completely because the employers acted too hastily and failed to follow the proper procedure prior to discharge. Procedural defects cited by the arbitrators include (1) employer made no effort to investigate facts properly, and investigation did not extend to obtaining a statement from the grievant or the patient (219); (2) employer's treatment of the grievant is inconsistent with its prior practice in similar situations (192); (3) employer did not exhaust process of progressive discipline (118); and (4) employer failed to warn employee in formal manner regarding his driving delinquencies (69).

Generally arbitrators consider the discharge penalty too harsh for acts of unintentional negligence (109). In most of these cases, the prior record of the employee is good; and arbitrators rule that the discharge penalty is too severe
for one simple act of carelessness or negligence. Length of service with the company also serves to mitigate the penalty.

In cases of extreme negligence—complete indifference to job duties or the absence of extraordinary care and attention required in the performance of certain jobs—the discharge penalty is usually considered appropriate. This is especially true if the act of negligence endangers the safety of employees or results in substantial property loss. Arbitrator Berkman sustained the discharge of a process operator who could have prevented an explosion causing considerable damage to company property and endangering the safety of the other employees. Since the evidence clearly established that Hess Oil Virgin Islands Corporation provides thorough training of its employees in safety procedures, it has the right to insist upon competence and careful adherence to its procedures (107).

A district court upheld the discharge of an Indian construction worker who filed charges of race discrimination against H. C. Smith Construction Company. The company maintained that the worker was fired for his part in rigging a crane load unsafely which resulted in an accident. The court found that the worker did in fact participate in an unsafe work practice—a legitimate, nondiscriminatory reason for discharge (10).
Insubordination

Management had been given wide latitude in assigning duties to workers and in scheduling work. Even though management has the authority to make job assignments, to specify work methods, and to set standards of work performance, workers sometimes openly defy management authority and refuse to obey the orders of management or engage in some other type of unacceptable conduct. When this happens, the workers are charged with insubordination, and some form of discipline is imposed. The discharge penalty is assessed quite frequently for acts of insubordination since such behavior interferes with management's ability to operate an efficient business.

A total of 44 arbitral awards and 5 judicial awards was analyzed in this category. These awards constitute 12.5 percent of the 351 arbitration awards and 17 percent of the judicial awards in all of the categories included in this research. The statistical summary in Table III shows the number and percent of discharges that were upheld, modified, or overturned and the extent to which the final decisions were influenced by substantive or procedural or both substantive and procedural criteria.

Management met the burden of proving just cause for discharge in 11 of the 44 arbitration cases, or 25 percent. In 7 cases, or 15.9 percent, management's action was upheld on both substantive and procedural grounds. Of the 20 awards modifying the discharge penalty, 12 cases, or 27.3 percent,
### TABLE III

**ARBITRAL AND JUDICIAL AWARDS IN DISCHARGE CASES FOR INSUBORDINATION**

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*Source: Compiled from labor arbitration and court cases reported in various reporting services from 1970-1980.*
were not upheld because of substantive defects; 3 cases, or 6.8 percent, failed to meet procedural criteria; and 5 cases, or 11.4 percent, violated both substantive and procedural standards. The arbitrator ruled that though some form of discipline was merited, the discharge penalty was too harsh. The arbitrator's award completely overturned management's action in 6 cases, or 13.6 percent. The employees were returned to their former positions with full seniority, back pay, and other contractual benefits. Of these 6 cases, 3, or 6.8 percent, did not meet the just cause standards; 2, or 4.5 percent, failed to meet the procedural standards; and 1, or 2.3 percent, did not meet both the just cause and procedural standards.

The judicial award summary shows that management's action was upheld in the 5 cases analyzed. The company met the burden of proving just cause for discharge in 3 of the cases, or 60 percent. In the 2 remaining cases, or 40 percent, the discharge action was upheld because both the substantive and procedural criteria were met.

The arbitration cases analyzed in this section reveal that the employees were discharged most often for refusing to perform work assignments. A few of the cases dealt with refusal to work overtime or to obey instructions of a general nature. Arbitrators maintain that even if an order seems improper or unreasonable, employees should obey the order first and question the propriety of the order later. An
important exception to the view that employees must not resort to self-help by taking matters into their own hands exists where obeying an order would endanger the health or safety of someone.

Mine Services, Inc., discharged an employee for refusing to obey a project superintendent's work order. In upholding the discharge, the arbitrator observed that the employee's merely stating that he was "cold" and "some could take it and some can't" could not be construed, as the employee had claimed, that he was being required to work in an unhealthy situation (146).

Arbitrator Lubow sustained the discharge of a mail messenger who refused to obey the employer's order to deliver the mail. The plant rules subject employees to immediate discharge for insubordination. The grievant contended that he could not make the delivery because he was cold and wet as a result of the weather, but the arbitrator concluded that the weather condition did not constitute imminent danger to health and safety that would entitle the employee to resort to self-help (67).

A forklift operator was discharged for refusing to load a tractor trailer at the loading dock that he feared was dangerous because of an oil spill in the area. The arbitrator's investigation revealed that the foreman's work order was reasonable; thus, the discharge was upheld (73). An annealing furnace tender was discharged for refusing to obey
an order to assist other employees in restoring a furnace to operation. In upholding the discharge, the arbitrator did not accept the employee's argument that the conditions under which he was directed to work constituted an unusual health hazard (100).

But discharge was considered too severe for female fabricators who persistently refused to obey the order of a leadman since they were sincere in questioning the safety of the assigned work. The employees were reinstated to their former positions without back pay subject to the condition that they agree to perform the buffing jobs and other appropriate work assigned to all employees in their classification (104).

And in another situation, discharge was declared too severe for an employee who refused to obey her superintendent's order not to leave the plant after she had slapped a co-worker who had been throwing cardboard separators at her. The employee had been under psychiatric care for depression, and her doctor certified that her departure at the time was "psychologically necessary." Arbitrator Archer concluded, therefore, that the employee's continued mental health may have been jeopardized had she remained at the plant during such a stressful period (48).

Although arbitrators view insubordination as a serious offense, they expect management to use discretion in assessing the discharge penalty for insubordinate behavior.
Discharges for insubordination are generally upheld if the work orders are contractually proper and reasonable and the proper procedures have been followed. The influence of these factors is reflected in several of the awards sustaining the discharge action of employers.

For instance, an employee who repeatedly refused to obey a foreman's order was discharged by Bechtel Power Corporation. In upholding the discharge, Arbitrator Daughton explained that (1) the grievant was given several opportunities to move his water truck but consistently refused to do so; and (2) the rule under the circumstances was not applied in an uneven or inconsistent manner (17).

Arbitrator Ferguson determined that Lozier Corporation had just cause to discharge a female employee who refused to wear slacks for safety reasons as ordered by the foreman, general foreman, and plant manager. Ferguson's decision to uphold the discharge was based upon the following considerations: (1) the dress regulation is a reasonable safety regulation which the employer has a right to adopt and enforce; (2) the employee had ample opportunity to protect her job and to contest the validity of the instructions; and (3) the instructions given to the employee by her supervisors were clear (137).

The discharge of an employee for refusing to obey her foreman's order to clean a belt was upheld. The employee had an extremely poor work record and had been warned previously
that she would be discharged if she did not improve her conduct (155). At Grocers Baking Company, an employee was discharged for refusing to perform required overtime. Arbitrator Daniel upheld the discharge since the employee had violated the contract and the penalty for such violation is discharge. Daniel noted that the penalty is particularly justified in light of the grievant's past disciplinary record. The employer had attempted to help the employee improve her behavior by following a progressive discipline program, but the employee had not responded (101).

On the other hand, employers should expect to have their discharge decisions modified or revoked when the evidence shows that management acted improperly. Several of the discharges were changed to suspensions or overturned completely because management failed to follow proper procedures prior to discharge. Although guilty of insubordination, an employee was reinstated without back pay because sufficient time did not elapse between the issuance of the warning and the discharge to satisfy the requirements of progressive discipline, and the warning itself was given too casually to qualify as a formal warning (201).

A Phoenix Transit Company employee was discharged for failing to keep required eye examination appointments. The arbitrator reinstated the employee without back pay since the company did not investigate the reasons for the employee's failure to keep the appointments (176). An employee of
Furr's, Inc., was returned to his job because the manager did not tell the employee the reason for his discharge at the time of the discharge (77).

The arbitrator overturned the discharge of two senior maintenance workers who refused to perform assigned work in the nuclear facility since the employer had not given the employees sufficient forewarning concerning a change in practice in assigning the work. The award called for the reinstatement of the employees with accumulated seniority and back pay (54). The discharge of an employee for refusing to take a physical examination was overturned because the employer did not follow the "due process" procedures outlined in the contract (153).

The import of procedural requirements in assessing penalties for insubordination is further illustrated in the following cases in which the discharge was converted to a lesser form of discipline.

1. The grievant's actions on the date of the incident which triggered the discharge did not by themselves constitute insubordination of sufficient gravity to warrant dismissal, and most of the written reprimands the grievant had received previously were for relatively minor offenses and did not adequately warn the grievant that his job was in jeopardy (181).

2. Although the supervisor ordered the grievant back to work, he failed to inform the grievant of the consequences for failing to return to work (106).

3. The employer should publicize the rules of conduct directly or by constant, consistent enforcement (112).
4. The company failed to conduct a fair investigation prior to discharge and did not properly warn the employee that his conduct could lead to termination (13).

Arbitrators also consider the circumstances surrounding each case where the presence of mitigating factors may influence their decision to modify or overturn the discharge penalty. In each of the following cases the discharge was reduced to a lesser penalty because of extenuating circumstances.

1. The employee had worked for six years for the employer during which time he advanced from the position of serviceman to working foreman, and progression establishes that the employer had rewarded him for his ability and capacity; lack of disciplinary record against the grievant establishes that he has been an exemplary employee; and grievant's conduct could be explained by the illness of his daughter who needed care at home in the evenings (186).

2. The employee was having medical difficulties and was both under medication and in pain; grievant had a seven-year satisfactory record; and grievant realized the gravity of his lack of judgment and self-control and will not engage in such conduct again (224).

3. The employee had an excellent record as an employee and was described by the foreman himself as a good worker; the employee had an exemplary attendance record (172).

4. The employee's action merely was misguided rather than insubordinate since she was unfamiliar with the procedure for filing a grievance (117).

5. The employee had a very good work record, had never been disciplined by the employer, had missed church on previous Sundays to work overtime, and was not told that the Sunday work was of an emergency nature (92).
Four discharges were overturned because the companies in each case did not establish that the employees had been insubordinate. The employees were reinstated with full back pay and other benefits (34, 43, 55, 229).

The judicial awards suggest that employers have the support of judges in cases involving employee insubordination. In the 5 cases analyzed, the discharges for various acts of insubordination were upheld since there was no evidence of discrimination as the employees had charged.

At New York Telephone Company a black telephone frame-man was discharged for refusing to report to work for restricted duties following an injury. The company had sent the worker a letter warning him of disciplinary action which could lead to termination. Claims of racial discrimination were dismissed since the plaintiff failed to prove the company’s discharge was racially motivated (232).

In the Murphy Motor Freight Lines, Inc., case, the court sustained the discharge of a black employee who had repeated disciplinary problems and low productivity. The company introduced an abundance of warning letters and personnel disciplinary reports at the trial, and thus the plaintiff could not prove the requisite connection between his race and discharge (64).

In another case, the court ruled that the company discharged a black employee for refusing a work assignment in his job category; thus, claims that the supervisor showed
racial animus to the discharged employee were rejected and unsupported (131). In still another case, the court upheld Singer Company's discharge of an affirmative action officer for failing to perform the tasks of his position (199). And the court found that the Board of Education of the City of Chicago was justified in discharging a teacher for refusing to follow the curriculum that was set out in the policies and directives of the school system (168).

Union Activities

A widely held principle among arbitrators is that leadership or participation in unauthorized work stoppages and other proscribed union activities are among the most serious breaches of labor-management contracts. In spite of the fact that most collective bargaining agreements prohibit certain union activities, workers on occasion do resort to wildcat strikes, slowdowns, picketing, and various other acts that result in discharge.

A total of 29 arbitral awards was analyzed in this category. These awards constitute 8.3 percent of the 351 arbitration awards in all of the categories included in this research. The statistical summary in Table IV shows the number and percent of discharges that were upheld, modified, or overturned and the extent to which the final decisions were influenced by substantive and procedural or both substantive and procedural criteria.
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</table>

*Source: Compiled from labor arbitration cases reported in Labor Arbitration Reports, volumes 70-73.*
Sixteen, or 55.2 percent, of the 29 cases were upheld, and management met the burden of proving just cause for discharge in each of them. Procedural standards, therefore, were not applicable to these cases. The discharge penalty was modified in 4 of the cases, or 13.8 percent. In all 4 cases, the substantive criteria were not met. The employer's action was completely overturned in 9 cases, or 31 percent. Of these 9 cases, 6, or 20.7 percent, did not meet the just cause standards; 1, or 3.4 percent, failed to meet the procedural standards; and 2, or 6.9 percent, did not meet both the just cause and procedural standards.

The discharge penalty is generally upheld for those employees who play prominent and responsible roles in causing or prolonging illegal work stoppages. At Grumman Flxible, 12 workers were discharged for participating in a strike that was unauthorized by the union and violated the no-strike clause in the labor contract. The availability of evidence and the degree of employee participation influenced Arbitrator Stout's decision to uphold 10 of the discharges and reduce 2 discharge penalties to suspensions. The evidence showed that the strikers rejected pleadings of the union and company officials to cease their strike activities. The 10 employees whose discharges were sustained had been at the plant every day of the strike, thereby confirming their active participation in the strike. Stout reduced the discharge penalty to disciplinary suspension for one employee
who appeared at the plant on two separate days to get an explanation of a restraining order he had received and for another employee who had worked the first five days of the strike and missed the last three days because of threats to him and his wife (102).

At Clinton Corn Processing Company, the discharge of union board members was declared proper because the members did not take sufficient affirmative public action to disavow the strike and urge the employees to return to work (49). The union president at ITT Thompson Industries, Inc., was discharged for his behavior during an unauthorized work stoppage. The president, while consuming alcohol, had shuttled between plant, bar-cafe, and the picket line. The discharge was upheld although the president contended that his followers would not follow his commands. In making the award, the arbitrator noted that the contract clearly does not provide loopholes so as to permit infractions when employees "are upset" or when a union official is unable to take care of events. Moreover, history shows that leaders, both strong and weak, have been punished for infractions carried out by their organizations (120).

Arbitrator McDonald upheld the discharge of an employee who was one of the main agitators and leaders of an illegal walkout at Quanex Mac Steel Division. McDonald considered discharge too harsh a penalty, however, for the steward whose criticism of the employer and union committee led to an
illegal work stoppage. The evidence in the case indicated that the steward made efforts to halt the stoppage once he realized that the employer and union committee had the authority to act as they did and that his actions might result in a number of fellow employees losing their jobs. Further, there was no evidence that the steward led the walk-out or was one of the vocal leaders on the picket line (182).

The discharge of a union officer who directed an employee not to take a nonunit job was changed to a suspension because the officer did not instigate or participate in work stoppage within the meaning of the contract but merely created the "possibility" of a shutdown. He did make himself subject to the disciplinary provision of the contract, however, since he counseled the employee to violate the collective bargaining agreement by declining the temporary assignment and refused to use the grievance procedure to challenge the employer's direction (138).

Most arbitrators consider the discharge penalty too severe for various other union activities and, in many instances, reinstate employees with full back pay and other contractual benefits. An employee of Coca Cola Bottling Company was discharged for unexcused absenteeism for the days he refused to cross the primary picket line at the plant entrance. The discharge was overturned since the employee's decision not to cross the picket line was protected by contract barring discharge or discipline action of an employee
who refuses to go through or work behind any primary picket line (50). Dan's Market, Inc., also violated the collective bargaining agreement when it discharged employees for refusing to cross a primary picket line, and Arbitrator Harter's award called for reinstatement (56).

Arbitral decisions also point to the importance of adhering to procedural standards in cases involving certain union related activities. An employee who was discharged for his alleged failure to maintain his union membership in good standing was reinstated without loss of pay or benefits. The grievant was discharged because (1) the company misread a vaguely composed notice from the union, and (2) the union failed to communicate with the grievant prior to discharge (134).

An alleged threat to "ship out" a co-worker for not joining the union resulted in the discharge of an employee at Newbury Manufacturing Company. The arbitrator overturned the discharge since (1) the statement was made in a joking atmosphere and manner, (2) a rather long period of time elapsed between the time of the incident and the discharge, and (3) the employer failed to talk to the grievant or any other employee concerning the incident (158).

Although the union president at Messenger Corporation distributed union cards to unit members during working hours in violation of company rule, Arbitrator Brooks overturned the discharge because (1) the presumption that the rule is
unlawful has not been overcome; (2) employer's disparate
treatment of the grievant constitutes an unfair labor prac-
tice; (3) employer failed to follow the progressive
discipline procedures prior to discharge (143).

Other Offenses

Cases analyzed in this section pertain to a variety of
matters that do not fit into any of the other categories,
i.e., unprofessional conduct toward customers, garnishments,
failure to pass a polygraph test, and various other reasons.
In several of these cases, employees charged their employers
with unlawful sex discrimination.

A total of 29 arbitral awards and 7 judicial awards was
analyzed in this category. These awards constitute 8.3 per-
cent of the 351 arbitration awards and 24.1 percent of the
judicial awards in all of the categories included in this
study. The statistical summary in Table V shows the number
and percent of discharges that were upheld, modified, or
overturned and the extent to which the final decisions were
influenced by substantive or procedural or both substantive
and procedural criteria.

The arbitral awards show that management met the burden
of proving just cause for discharge in 5 of the 29 cases, or
17.2 percent. In 4 cases, or 13.8 percent, management's
action was upheld on both substantive and procedural grounds.
Of the 6 cases in which the discharge penalty was modified, 4
cases or 13.8 percent, were not upheld because of substantive
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*Source: Compiled from labor arbitration and court cases reported in various reporting services from 1970-1980.*
defects; 1 case, or 3.4 percent, failed to meet procedural criteria; and 1 case, or 3.4 percent, violated both substantive and procedural standards. The arbitrator's award completely overturned management's action in 14 cases, or 48.2 percent; and the employees were reinstated to their prior employment status without loss of seniority, back pay, and other contractual benefits. Of these 14 cases, 11, or 37.9 percent, did not meet the just cause standards; 2, or 6.9 percent, failed to meet the procedural standards; and 1, or 3.4 percent, failed to meet both the just cause and procedural standards.

The judicial award summary shows that management's action was upheld in 2 of the 7 cases, or 28.6 percent, and was overturned completely in the other 5 cases, or 71.4 percent. Management met the just cause requirement in the cases that were upheld but failed to prove just cause in the 5 cases that were overturned.

In cases where employees are discharged for unprofessional conduct toward customers, arbitrators stand firmly with the employers, provided both the substantive and procedural requirements are met. Arbitrator Allen upheld the discharge of an employee of the Muskegon County Board of Commissioners for borrowing money from clients. The grievant had been disciplined for unprofessional conduct on two previous occasions within six months of the discharge (152). Pioneer Transit Mix Company's discharge of a union steward
for his belligerent and arrogant attitude toward customers was upheld by Arbitrator Darrow. The supervisor had warned the grievant that he would be fired if his behavior did not improve (178).

A grocery checker at Great Atlantic and Pacific Tea Company was discharged for insulting customers. The arbitrator upheld the discharge since the evidence established that the employee had a history of problems with fellow employees, customers, outside salesmen, and supervisory employees and had been given "one chance after another" to improve his behavior (96). But a cashier discharged for rudeness to customers was reinstated. Although the evidence indicated serious wrongdoing, the company failed to meet the procedural requirements. The company was faulted for not advising the grievant of the customer complaints as they occurred so that both she and the company could clearly develop the facts. Failure to advise the employee of the complaints as they occurred had the effect of making the employee believe that her behavior was acceptable (9).

Employers become involved in their employee's personal financial difficulties when employee earnings are subjected to garnishment. Because garnishment can become a source of annoyance and considerable expense to an employer, many contracts contain provisions against garnishment of wages. Some contracts even include the discharge penalty for repeated violation. The Consumer Credit Protection Act passed
in 1968 provides employees with some protection since it prohibits discharge of employees for a single indebtedness and restricts the extent to which wages may be garnished (174).

Garnishments were the cause of discharge in only two of the cases included in this study. The discharge action was upheld in one case and reduced to a lesser penalty in the other. Procedural criteria weighed heavily in determining the appropriate penalty in both cases.

Arbitrator Goldstein said that Shawnee Plastics, Inc., had just cause to discharge an employee who had at least two instances of indebtedness for which his earnings had been subjected to garnishments. In making his award, the arbitrator noted that the employer made a careful investigation of the underlying debts which precipitated the garnishment process and gave the employee reasonable guidance and counseling (196). In contrast, Arbitrator Bailey found that Delta Concrete Products Company, Inc., improperly discharged an employee against whom two garnishments were served. In his investigation of the case, Bailey found that the employer fell short of inquiring into all the circumstances surrounding the infraction, failed to give effective communication to the employee, and did not deal with this employee as it had another employee (58).

Failing a polygraph test is not considered just cause for discharge since a polygraph test is not accepted as evidence of guilt. In the three cases in which employees
were discharged for failing polygraph tests, the arbitrators ordered reinstatement with full back pay, seniority, and other contractual benefits (30, 150, 169).

Employees discharged for failing to pass physical examinations were reinstated to their former positions without penalty. The arbitrator declared the discharges improper since the results of the physical examinations were not communicated to the employees until they had completed their training period. The contract states that an "employee cannot be terminated for medical reasons without concurrence of majority of group composed of employer-approved physician agreed upon by both employer and employee" (221).

Discharges for a variety of other reasons were overturned also. According to Arbitrator Rudolph, an employee who was immediately terminated on giving a two-week notice to quit is entitled to two weeks' pay (189). Arbitrator Cohen reinstated a high school student who was coerced into quitting on being told that he must apologize, resign, and pay for alleged stolen items or the police would be called. The student offered to resign and pay for the stolen items even though he denied committing the theft. The employer admitted that he did not have evidence to prove the student's guilt (198).

Pacific Telephone and Telegraph Company involuntarily retired a 57-year-old employee who was certified by his doctor as disabled. The employer, however, considered him
capable of returning to work under the employee pension plan which gives the benefit committee discretion to retire employees who have worked thirty years or more for the employer. In overturning the company's action, Arbitrator Koven stated that involuntary retirement amounts to dismissal under the contract and therefore is subject to arbitration. Furthermore, there is nothing in either the plan or the contract allowing the employer to force the retirement of an employee as a means of discipline (166).

At Helwick Electronics, an employee was discharged without warning, without a proper and fair investigation, without the imposition of any progressive discipline, without any incident at the time of discharge, and without just cause. In Arbitrator Williams' opinion, he was dismissed for insufficient reasons under the collective bargaining agreement at a time that management thought was within the employee's probationary period; however, the grievant was not a probationary employee on the date of discharge (105).

Arbitrator Strongin overturned Bethlehem Steel Corporation's discharge of a female probationary employee for her "physical structure." The contract states that during the first 520 hours of work, the employer may lay off or discharge employees provided the discharge is not racially or sexually motivated. The union met the burden of proving that the grievant's "physical structure" would not have resulted in discharge had she been male (22).
The decisions in several court cases are evidence of increasing judicial concern for employee rights in the face of alleged sexual discrimination. The New Hampshire Supreme Court held that the discharge of a female employee was wrongful when the reason for the discharge was her refusal to have sexual relations with her foreman (149). Similarly, the United States Court of Appeals at Philadelphia agreed with the employee's charge that her employer had imposed a "term and condition of employment unlawfully based on sex." The employee alleged that during a conversation with her supervisor regarding a possible promotion, he made it clear that her continued employment was conditional on her agreeing to his sexual demands. The employee was discharged fifteen months later (214).

The decision of the United States Court of Appeals in the District of Columbia supported a female employee's charge against the Federal Environmental Protection Agency that her job had been abolished because she rebuffed her male supervisor's sexual advances (15). A district court found that the discharge of a female athletic administrator and coach was unlawful sex discrimination. Although the employer said the employee was discharged for her failure to make sufficient progress toward a Ph.D. degree, evidence showed that the claimant was treated less favorably than male faculty members. She was excluded from a dual appointment system which was available exclusively to male athletic directors
and coaches who had no teaching responsibilities or pressure to obtain advanced degrees (108).
CHAPTER IV BIBLIOGRAPHY

10. Armay Construction Company, 72 LA 1009 (King, 1979).
35. Campbell Soup (Texas) Incorporated, 73 LA 615 (Moore, 1979).
41. Chevron Oil Co., Western Div., 70 LA 572 (Davis, 1978).
42. Chromalloy American Corp., 72 LA 838 (Choen, 1979).
44. City of Iowa City, 72 LA 1006 (Sinicropi, 1979).
45. City of Mason, 73 LA 464 (Ellmann, 1979).
46. Clark Oil & Refining Corp., 73 LA 702 (Franke, 1979).
49. Clinton Corn Processing Company, 71 LA 555 (Madden, 1978).
57. Del Monte Corp., 71 LA 96 (Griffin, 1978).
60. Dover Corp., 72 LA 1254 (Glover, 1979).
70. Factory Services, Inc., 70 LA 1088 (Fitch, 1978).
71. Foodland Supermarket, Ltd., 71 LA 1225 (Gilson, 1978).
73. FMC Corporation, 70 LA 574 (Nigro, 1978).
74. FMC Corporation, 73 LA 705 (Marlatt, 1979).
75. Fry's Food Stores, Inc., 71 LA 1247 (Randall, 1979).
76. FS Services, Inc., 73 LA 610 (Cyrol, 1979).
77. Furr's, Inc., 70 LA 1037 (Gorsuch, 1978).
78. Furr's, Inc., 72 LA 960 (Leeper, 1979).
79. GE Co., 70 LA 1168 (Spencer, 1978).
82. General Cable Corp., 72 LA 975 (Watkins, 1979).
89. General Electric Co., 72 LA 441 (Foreman, 1979).
100. Griffin Pipe Products Co., 72 LA 1033 (Doyle, 1979).
104. Hayes-Albion Corporation, 73 LA 819 (Foster, 1979).
106. Hertz Corporation, 72 LA 733 (Gootnick, 1979).


120. ITT Thompson Industries, Inc., 70 LA 970 (Seifer, 1978).

121. Kaiser Foundation Health Plan, 73 LA 1057 (Herring, 1979).


128. Laclede Cab Company, 72 LA 351 (Bothwell, 1979).


137. Lozier Corporation, 72 LA 164 (Ferguson, 1979).


143. Messenger Corporation, 72 LA 865 (Brooks, 1979).

144. Metropolitan Atlanta Transmit Authority, 70 LA 1022 (Anderson, 1978).


150. Mount Sinai Hospital Medical Center, 73 LA 297 (Dolnick, 1979).

151. Murphy, 70 LA 1232 (Goldman, 1978).

152. Muskegon County Board of Commissioners, 71 LA 942 (Allen, 1978).


157. NCR, 70 LA 756 (Gundermann, 1978).

162. Orton/McCullough Crane Company, 73 LA 324 (Guenther, 1979).
179. Playboy Club of Century City, 70 LA 305 (Herman, 1978).

182. Quanex Mac Steel Division, 73 LA 9 (McDonald, 1979).


188. S & T Industries, Inc., 73 LA 858 (Madden, 1979).


201. Standard Shade Roller Division, 73 LA 86 (Dawson, undated).

203. Stevens Shipping & Terminal Co., 70 LA 1067 (Hall, 1978).
207. Sun Furniture Co., 73 LA 335 (Ruben, 1979).
211. Texas Utilities Generating Co., 71 LA 1205 (Mewhinney, 1979).
212. 3M Company, 70 LA 587 (Mueller, 1978).
224. Western Airlines, Inc., 72 LA 154 (Herman, Chambers, Morris, Norris, and Brodrick, 1979).
225. Western Auto Supply Co., 71 LA 710 (Ross, 1978).


CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

This research study was an investigation of arbitration awards and judicial decisions in discharge cases to provide answers to these basic questions: Are companies aware of the types of misconduct for which discharge is considered appropriate? Are companies aware of what constitutes the burden of proof requirements in discharge cases? Does management know and follow the proper procedures in handing discharge cases?

The purposes of the study were

1. To determine the extent to which discharges were overturned or modified because the company did not meet the burden of proving a reasonable cause for discharge;

2. To determine the extent to which discharges were overturned or modified because the company did not follow proper dismissal procedures;

3. To develop a model set of guidelines to assist companies in the proper handling of discharge cases. These guidelines present criteria for meeting the just cause and procedural requirements in discharge cases.
Effect of Substantive and Procedural Criteria In Arbitral and Judicial Decision-Making In Discharge Cases

A total of 351 arbitration awards and 29 judicial awards involving discharge was examined, classified according to major causes, and analyzed. The results of these awards are summarized in Table VI, "Arbitral Awards in Discharge Cases," and Table VII, "Judicial Awards in Discharge Cases." These tables show the number and percent of arbitral and judicial decisions that were upheld, modified, and overturned within each of the categories and reflect whether substantive, procedural, or both substantive and procedural factors influenced the arbitrators and judges in making decisions.

The discharge penalty was upheld in 47.3 percent of the arbitration cases but was mitigated in the remaining 52.7 percent with 31.4 percent of the discharges being modified to a lesser penalty and 21.3 percent being overturned completely. Discharges were upheld in 68.9 percent of the court cases and overturned completely in the remaining 31.1 percent.

The arbitral awards show that management met the burden of proving just cause for discharge in 111 of the 351 awards, or 31.6 percent. In 55, or 15.7 percent of the awards, management's action was upheld on both substantive and procedural grounds. Of the 110 awards modifying the discharge penalty, 61, or 17.4 percent, were not upheld because of substantive defects; 22, or 6.3 percent, failed to meet procedural criteria; and 27, or 7.7 percent, violated both
### TABLE VI

**ARBITRAL AWARDS IN DISCHARGE CASES**
**MARCH 1, 1978, TO MARCH 1, 1980**

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*Source: Tables I-V.*
TABLE VII

JUDICIAL AWARDS IN DISCHARGE CASES* 
FEBRUARY 20, 1970, TO APRIL 7, 1980

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*Source: Tables I-V.
substantive and procedural standards. The arbitrator's award completely overturned management's action in 75 awards, or 21.3 percent. Of these awards, 53, or 15.1 percent, did not meet the just cause standards; 5, or 1.4 percent, failed on procedural grounds; and 17, or 4.8 percent, failed to meet both the just cause and procedural standards.

The judicial award summary shows that management met the just cause requirement in 14 of the 29 cases, or 48.3 percent; and 6, or 20.7 percent, complied with both the just cause and procedural criteria. The court decisions overturning the discharge penalty cited substantive defects in 8 cases, or 27.6 percent, and both substantive and procedural defects in the one remaining case, or 3.4 percent.

For management's discharge decision to be upheld, it must first meet the just cause requirements; therefore, it is important to note that no cases were upheld based upon procedural factors only. It is possible, however, for a case to meet the just cause requirements; yet, the decision will be modified or overturned because the company failed to follow the proper procedures for dismissal. Arbitrators and judges often pointed out in their awards both the substantive and procedural factors that weighed heavily in their decisions.

Although the issue in each case was to determine whether there was sufficient cause for discharge, the rationale of the arbitrators and judges suggests widespread concern for fulfilling the procedural requirements for discharge. This
conclusion is supported by the number of awards in which the procedure was cited as a major consideration in deciding whether to uphold, modify, or overturn the discharge.

The awards investigated in this study indicate that the discharge penalty is to be used only as a last resort after milder forms of discipline have failed to produce the desired change in employee behavior. Discharges for first offenses were upheld, however, when there was sufficient evidence to prove the infraction (1) interfered with the employer's ability to operate an efficient and profitable business; (2) affected or threatened employee health and safety; (3) damaged or endangered company property; or (4) caused substantial material loss to the company. For first offenses of a less serious nature, arbitrators and judges expect employers to exhaust the progressive discipline process. The process usually involves four or more steps, culminating in an employee's either being "subject to discharge" or automatically terminated. Discharge is usually upheld, therefore, when the employee file shows that management has imposed increasingly stringent disciplinary measures for each subsequent offense.

A Model Set of Guidelines for Meeting the Requirements of Substantive and Procedural Criteria in Discharge Cases

To assist in the proper handling of employee dismissals, the following model set of guidelines was developed from the
arbital and judicial awards analyzed in this study. The guidelines are comprised of the substantive and procedural criteria that emerged as major factors in a majority of the cases within a particular category.

**Violation of Company Rules**

In evaluating discharges for violation of company rules, arbitrators and judges are extremely interested in what the company did prior to discharge. Did the company follow its own established disciplinary procedures as well as satisfy recognized arbitral and judicial standards? Once arbitrators and judges have found that the rules themselves are reasonable, they are particularly concerned with whether the employer (1) maintained adequate records to justify discharge; (2) conducted a fair investigation and provided the employee due process; (3) informed the employee of all reasons for the discharge decision; (4) communicated the rules as well as the penalties for violations; (5) applied progressive discipline where appropriate; and (6) enforced the rules and assessed the discipline fairly and consistently. More specifically, the employer should

1. Establish rules that are reasonable;

2. Communicate the rules as well as the penalties for violation;

3. Inform the employee of the reason for the discharge decision at the time of discharge;
4. Enforce the rules and assess the discipline consistently and fairly;

5. Conduct a thorough and fair investigation including due process;

6. Provide evidence to establish "beyond a reasonable doubt" standard of proof or "clear and convincing proof" for serious offenses such as theft, fighting, possession and/or use of drugs and alcohol, and striking a supervisor. Since these offenses are serious, progressive discipline, prior work record, and length of service generally are not considered in the award;

7. Give evidence to prove that employee willfully attempted to conceal information when discharge is for falsification of the employment application. Discharge is usually considered just for falsification of other company records;

8. Provide proof that disloyal practices had a detrimental effect upon the company's reputation;

9. Determine if an assault on a supervisor or a co-worker was the result of provocation or other mitigating circumstances;

10. Follow principle of progressive discipline for harassment of co-workers;

11. Follow closely the procedural rules in contract relating to the use and/or possession of drugs and alcohol. Employees with a good work record may be given another chance.
If drinking threatens the safety of employees or endangers company property, discharge is likely to be upheld;

12. Establish a progressive discipline program and adhere explicitly to its provisions for less serious offenses such as absenteeism, tardiness, violation of safety rules, and neglect of duties;

13. Keep complete and accurate records of employee behavior and the progressive disciplinary procedures that have been followed;

14. Consider the employee's past record and length of service before discharging an employee for neglect of job duties, i.e., sleeping on the job, leaving work area without permission, willfully limiting production.

Incompetence and Negligence

Proving just cause for discharge is often difficult in cases involving incompetence and/or negligence since management may be partly or wholly at fault for the unacceptable performance. Generally discharge is considered too harsh for a single infraction; thus, the principle of progressive discipline receives strong support in these cases. To meet the substantive and procedural requirements, the employer should

1. Set reasonable standards of performance in terms of quantity and quality;

2. Provide adequate training and give proper advice and counsel regarding training;
3. Provide specific documentation to prove worker incompetence and/or negligence;

4. Establish and follow a progressive discipline program aimed at helping both incompetent and negligent workers improve their performance. This criterion applies only to nonprobationary employees since probationary employees may be discharged for any reason except discrimination;

5. Enforce performance standards consistently and assess the discipline fairly;

6. Conduct a thorough and fair investigation including due process;

7. Consider the employee's work record and length of service before assessing the discharge penalty for acts of unintentional negligence;

8. Provide evidence of thorough training in safety procedures to support discharge for acts of negligence that endanger the safety of employees or result in substantial property loss.

Insubordination

Insubordination is considered a serious offense, yet management is expected to use discretion in assessing the discharge penalty for insubordinate behavior. Discharges for insubordination are usually upheld if the work orders are contractually proper and reasonable and the proper
procedures have been followed. To meet the substantive and procedural requirements, the employer should

1. Establish work orders that are contractually proper, reasonable, and safe;
2. Assign work orders in an even and consistent manner;
3. Communicate clearly work orders and instructions;
4. Give sufficient forewarning concerning a change in practice in assigning work;
5. Conduct a thorough and fair investigation including due process;
6. Inform the employee of the reason for discharge at the time of discharge;
7. Follow a progressive discipline program aimed at improving employee behavior;
8. Give adequate warnings concerning the consequences for insubordinate behavior;
9. Consider the employee's work record, length of service, and other extenuating circumstances before assessing the discharge penalty.

Union Activities

From the analysis of arbitration cases involving union activities, it can be concluded that discharge is considered just when there is sufficient proof of active leadership and participation in unauthorized work stoppages. Many union related activities, however, are not dischargeable offenses;
and discharge for such activities is prohibited in the labor contract. Moreover, many contracts specify the progressive disciplinary procedures to be applied in certain labor-management disputes. Specifically, the employer should

1. Present a high degree of proof to support charge that employee played a prominent and responsible role in causing or prolonging illegal work stoppage;

2. Check contract prior to discharge to determine if certain union activities are dischargeable offenses;

3. Follow the progressive discipline procedures specified in the contract for activities such as maintaining union membership, failing to pay membership dues, and distributing union cards to unit members.

Other Offenses

A key consideration for determining the appropriateness of the discharge penalty in the variety of cases analyzed in the "other offenses" category was whether the discipline was administered uniformly and consistently among employees charged with similar offenses. Several substantive and procedural factors emerged as major considerations when dealing with unprofessional conduct, garnishments, polygraph tests, and similar cases. Basically, the employer should

1. Establish and follow a progressive discipline program for acts of unprofessional conduct toward customers;
2. Make a careful investigation, give effective communication to the employee, and deal with the employee in a consistent manner when employee earnings are subjected to garnishment;

3. Provide evidence of guilt apart from a polygraph test since failing a polygraph test is not accepted as evidence of guilt and thus is not just cause for discharge;

4. Apply employment and promotion requirements equally to men and women.

Although these criteria are important factors in judging the propriety of the discharge penalty, they cannot be accepted as the final word. An employee's work record or length of service, for example, may mitigate the discharge penalty to a lesser form of discipline or no discipline at all. Thus, the final decision is determined by the facts and circumstances in each individual case.

Concluding Remarks and Recommendation

The arbitral and judicial awards analyzed here suggest that many employers have accepted the concept of progressive discipline as a basic norm in labor-management relations. It is quite possible that concerned employers will develop even more formalized progressive discipline programs in the future that not only result in improved employee behavior but also meet the arbitral and judicial standards for discharge.
Evidence of increasing concern for protecting employees in both union and nonunion firms from unfair dismissal continues to be reflected in legislation, arbitral and judicial decisions, and public opinion. Thus, the legal limitations and accepted practices that affect management's right to discharge may change significantly in the next few years. Employers and employees need to stay abreast of the ongoing developments in labor-management relations; therefore, a continuing review of arbitration and court cases is recommended.
BIBLIOGRAPHY

Books


Articles


Reports


West Virginia Pulp and Paper Co., 45 LA 515 (Daugherty, 1964).
Public Documents


Unpublished Materials


